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EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

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No. 698

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,
Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY (A CORPORATION),
Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filmer-Rollins Co. Print., 424 Sansome St., S. F.

INDEX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM WOLFF,
Plaintiff in Error,
vs.
WELLS, FARGO & COMPANY (a Corporation),
Defendant in Error.

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty (30) days from and after the 19th day of January, 1901, within which to file and docket his transcript of the record on the writ of error herein, and the time to file and docket such transcript is hereby enlarged thirty (30) days from and after said 19th day of January, 1901.

Dated San Francisco, January 17, 1901.

WM. W. MORROW,
Judge of the Circuit Court of Appeals.

[Endorsed]: No. 698. Circuit Court of Appeals, Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo and Company (a Corporation), Defendant in Error. Order Enlarging Time to File Transcript. Filed January 17, 1901. F. D. Monckton, Clerk. Vogelsang & Brown, Attorneys for Plff. in Error, Mills Building, 7th Floor, San Francisco, Cal.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM WOLFF,
Plaintiff in Error,
vs.
WELLS, FARGO & COMPANY (a Corporation),
Defendant in Error.

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty (30) days from and after the 15th day of February, 1901, within which to file and docket his transcript of the record on the writ of error herein, and the time to file and docket such transcript is hereby enlarged thirty (30) days from and after said 18th day of February, 1901.

Dated San Francisco, February, 15, 1901.

WM. W. MORROW,
Judge of the Circuit Court of Appeals.

Endorsed: No. 698. Circuit Court of Appeals. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Company (a Corporation), Defendant in Error. Order Enlarging Time to File Transcript. Filed Feb. 15, 1901. F. D. Monckton, Clerk. Vogelsang & Brown, Attorneys for Plaintiff in Error, Mills Building, 7th Floor, San Francisco, Cal.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM WOLFF,
Plaintiff in Error,
vs.
WELLS, FARGO & COMPANY (a Corporation),
Defendant in Error.

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty (30) days from and after the 18th day of March, 1901, within which to file and docket his transcript of the record on the writ of error herein, and the time to file and docket such transcript is hereby enlarged thirty (30) days from and after said 18th day of March, 1901.

Dated San Francisco, March 18, 1901.

WM. W. MORROW,
Judge of the Circuit Court of Appeals.

[Endorsed]: No. 698. Circuit Court of Appeals, Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co. (a Corporation), Defendant in Error. Order Enlarging Time to File Transcript. Filed March 18, 1901. Frank D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk. Vogelsang & Brown, Attys. for Plaintiff in Error. Mills Bldg., 7th Floor, San Francisco, Cal.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM WOLFF,
Plaintiff in Error,
vs.
WELLS, FARGO & COMPANY,
Defendant in Error.

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty days from and after the 17th day of April, 1901, within which to file and serve his transcript of the record herein, and the time for filing and service of said transcript is hereby enlarged for thirty days from and after said 17th day of April, 1901.

Dated San Francisco, this 17th day of April, 1901.

WM. W. MORROW,
Judge of the Circuit Court of Appeals.

[Endorsed]: No. 698. United States Circuit Court of Appeals Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co., Defendant in Error. Order Enlarging Time Within Which to File Transcript of Record. Filed April 17, 1901. F. D. Monckton, Clerk. Vogelsang & Brown, Attorneys for Mills Building, 7th Floor, San Francisco, Cal.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

WELLS, FARGO & COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF,

Defendant.

Complaint.

Plaintiff herein complains of the above-named defendant and for cause of action alleges:

I.

That at all the times hereinafter mentioned plaintiff was and now is a corporation organized and existing under the laws of Colorado, and is a citizen and resident of the State of Colorado.

II.

That the defendant is a citizen of the State of California and a resident of the Northern District of the said State of California, and is engaged in doing business under the name of William Wolff & Co., in the city and county of San Francisco, in said State of California.

III.

That the plaintiff has constructed a building in the said city and county of San Francisco.

IV.

That heretofore, to wit, on or about the 24th day of September, 1897, and prior to the construction of said building, the defendant agreed to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of said building, said cement to be furnished at the rate of $2.56 per barrel.

V.

That the plaintiff has required and has been compelled to use 7,925 barrels of said cement in the construction of said building, and that, pursuant to the terms of said agreement, the defendant sold and delivered to the plaintiff 5,000 barrels of said cement, and no more, and though often requested by the plaintiff to sell to it, in addition to the said 5,000 barrels, 2,925 barrels of said cement, at the said rate of $2.56 per barrel, for use in the construction of said building, the defendant wholly failed and neglected and refused to sell to the plaintiff any more than said 5,000 barrels of said cement at the said rate of $2.56 per barrel, or at any less rate, and that the plaintiff has been ready and willing to receive said 2,925 barrels of said cement and to pay for the same at the said rate of $2.56 per barrel.

VI.

That by reason of the said failure, neglect and refusal of said defendant to furnish said 2,925 barrels of said cement to the plaintiff at the said rate of $2.56 per barrel the plaintiff at the said rate of $2.56 per barrel, the plaintiff has been damaged in the sum of two thousand

eight hundred and seventy-six dollars ($2,876), no part of which has been paid.

Wherefore, said plaintiff prays judgment against the defendant for the sum of two thousand eight hundred and seventy-six dollars ($2,876), with interest thereon at the rate of seven per cent per annum, and for its costs of suit.

E. S. PILLSBURY,
Attorney for Plaintiff.

State of California,
Northern District of California,
City and County of San Francisco. } ss.

Aaron Stein, having been first duly sworn, says on oath: I am an officer, to wit, the secretary of Wells, Fargo and Company, a corporation, the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true, except as to those matters which are therein stated on the information and belief of the said corporation, and as to those matters I believe it to be true.

AARON STEIN.

Subscribed and sworn to before me this 29th day of November, 1898.

[Seal] A. J. HENRY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 29, 1898. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

WELLS, FARGO & COMPANY (a Corporation),
Plaintiff,
vs.
WILLIAM WOLFF,
Defendant.

Summons.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the city and county of San Francisco.

The President of the United States of America, Greeting, to William Wolff, Defendant:

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

You are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of our independence the one hundred and twenty-third.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]:

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 6th day of March, 1899, and personally served the same on the 6th day of March, 1899, upon William Wolff, by delivering to, and leaving with William Wolff, said defendant named therein, personally, at the city and county of San Francisco, in said District, a certified copy thereof, together with a copy of the complaint, certified to by plaintiff's attorney.

San Francisco, March 6th, 1899.

JOHN H. SHINE,
United States Marshal.
By J. A. Littlefield,
Office Deputy.

Filed March 7, 1899. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),
Plaintiff,

vs.

WILLIAM WOLFF,
Defendant.

Answer.

Now, comes the defendant, above named, and in answer to the complaint of plaintiff on file herein, admits, denies and alleges as follows, to wit:

I.

Said defendant admits the allegations set forth in paragraphs one (1), two (2), and three (3) of said complaint.

II.

Defendant denies that on or about the 24th day of September, 1897, or prior to the construction of said building mentioned in said complaint, or at any time or at all, said defendant agreed to sell to plaintiff as much Alsen's German Portland Cement, or any other cement, as the plaintiff should require for use in the construction of said building, or otherwise, at the rate of two and 56-100 dollars ($2.56) per barrel. And in that behalf defendant al-

leges the fact to be that on or about the 24th day of September, 1897, and prior to the construction of said building, defendant and plaintiff contracted for the price of two and 56-100 dollars ($2.56) per barrel on five thousand (5000) barrels of said cement delivered at the building site of said building in the city and county of San Francisco; and thereupon and thereafter, and before the commencement of this action, defendant did deliver said five thousand (5,000) barrels at the rate of two and 56-100 dollars ($2.56) per barrel at said building site, and on his part performed all the terms and conditions of said contract.

III.

Defendant has no information nor belief sufficient to enable him to answer the allegation that plaintiff has required and has been compelled to use seven thousand nine hundred and twenty-five (7,925) barrels of said cement, or any number of barrels in excess of five thousand (5,000) barrels in the construction of said building, and therefor, and on that ground, defendant denies that plaintiff has been compelled to use seven thousand nine hundred and twenty-five (7,295) barrels if said cement or any number in excess of five thousand (5,000) barrels in the construction of said building. Said defendant denies that plaintiff requested him to sell to it, in addition to the said five thousand (5,000) barrels, two thousand nine hundred and twenty-five (2,925) barrels of said cement at the said rate of two and 56-100 dollars ($2.56) per barrel for use in the construction of said building, or other-

wise, or at all; but defendant admits that plaintiff did request him to sell to it more barrels of said cement than the aforesaid five thousand (5,000) barrels for use in the construction of said building at the rate of two and 56-100 dollars ($2.56) per barrel; and thereupon defendant was ready and willing to sell plaintiff said cement in excess of said five thousand (5,000) barrels at the current market rate, but said plaintiff refused to receive any of said cement from defendant in excess of said five thousand (5,000) barrels at the current market rate, which said current market rate was in excess of two and 56-100 dollars ($2.56) per barrel.

IV.

Defendant has no information nor belief sufficient to enable him to answer the allegation of plaintiff that by reason of the failure, neglect, and refusal of defendant to furnish said two thousand nine hundred and twenty-five (2,925), or any barrels, of said cement to plaintiff at the said rate of two and 56-100 dollars ($2.56) per barrel, plaintiff has been damaged in the sum of two thousand eight hundred and seventy-six ($2,876) dollars; therefore, and on that ground, defendant denies that by any failure or neglect or refusal on his part to furnish said two thousand nine hundred and twenty-five (2,925) barrels or any number of barrels of said cement, or any cement to plaintiff at the said rate of two and 56-100 dollars ($2.56) per barrel, or at any rate or at all, the plaintiff has been damaged in the sum of two thousand eight hundred and seventy-six ($2,876) dollars, or in any sum whatever.

And further answering said complaint, by way of counterclaim* thereto, said defendant alleges:

I.

That at all the times hereinafter mentioned, plaintiff was, and now is, a corporation organized and existing under the laws of Colorado, and is a citizen and resident of the State of Colorado.

II.

Defendant is a citizen of the State of California and a resident of the Northern District of the said State of California, and is engaged in doing business under the name of William Wolff and Company, in the city and county of San Francisco, said State.

III.

At the time of the commencement of this action, plaintiff has constructed a building in the city and county of San Francisco.

IV.

Heretofore, on, to wit the 24th day of September, 1897, plaintiff contracted to purchase of said defendant, and said defendant contracted to sell plaintiff at the rate of two and 56-100 dollars ($2.56) per barrel at the site of the aforesaid building in the city and county of San Francisco, five thousand (5,000) barrels of Alsen's German Portland Cement; that thereupon, pursuant to said contract, said defendant sold and delivered, and said plaintiff purchased, said five thousand (5,000) barrels of said

*Amd. by Ord. Court, Oct. 16, 1899, W. B, B., Dep. Clk.

cement at the rate of two and 56-100 dollars ($2.56) per barrel, and said plaintiff, before the commencement of this action, became indebted to defendant therefor in the sum of twelve thousand eight hundred ($12,800) dollars in United States gold coin. That no part thereof has been paid, saving and excepting the sum of ten thousand five hundred and thirty-four and 40-100 dollars ($10,534.40) on account thereof; and at the time of the commencement of this action there was, and still is, due and payable to the said defendant on account of said contract, the sum of two thousand two hundred and sixty-five and 60-100 dollars ($2,265.60).

And further answering said complaint, and as a separate, second and distinct counterclaim* thereto, said defendant alleges:

I.

That at all the times hereinafter mentioned plaintiff was, and now is, a corporation organized and existing under the laws of Colorado, and is a citizen and resident of the State of Colorado.

II.

Defendant is a citizen of the State of California and a resident of the Northern District of the said State of California, and is engaged in doing business under the name of William Wolff and Company in the city and county of San Francisco, said State.

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*Amd. by Ord. of Court, Oct. 16, 1899. W. B. B., Dep. Clk.

III.

Heretofore, within one (1) year last past, and before the commencement of this action, said plaintiff became indebted to plaintiff in the sum of two thousand two hundred and sixty-five and 60-100 dollars ($2,265.60) on account of eight hundred and eighty-five (885) barrels of Alsen's German Portland Cement, sold and delivered by said defendant to plaintiff in the city and county of San Francisco, at the special instance and request of said plaintiff.

IV.

No part of said sum of two thousand two hundred and sixty-five and 60-100 dollars ($2,265.60) has been paid, and at the time of the commencement of this action there was, and still is, due and payable therefor from said plaintiff to said defendant the sum of two thousand two hundred and sixty-five and 60-100 dollars ($2,265.60) United States gold coin.

Wherefore, said defendant prays that said plaintiff recover nothing in this action; and that said defendant do have judgment against plaintiff for the sum of two thousand two hundred and sixty-five and 60-100 dollars ($2,265.60), with interest thereon at the rate of seven (7 per cent) per cent per annum from June 1st, 1898, and for costs of suit.

VOGELSANG & BROWN,
Attorneys for Defendant.

United States of America,
State of California,
City and County of San Francisco. } ss.

William Wolff, being first duly sworn, deposes and says that he is the defendant in the above-entitled action: that he has read the foregoing answer and well knows the contents thereof. That the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters that he believes it to be true.

WILLIAM WOLFF.

Subscribed and sworn to before me this 3d day of April, 1899.

[Seal] EUGENE W. LEVY,
Notary Public.

Service of within answer admitted this seventh day of April, 1899.

E. S. PILLSBURY,
Atty. for Plff.

Filed April 7th, 1899. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),
Plaintiff,
vs.
WILLIAM WOLFF,
Defendant.
No. 12,711.

Demurrer to Cross-Complaint.

Now, comes the plaintiff and demurs to the first count of the cross-complaint of the defendant herein, on the ground that said first count does not state facts sufficient to constitute a cause of action for a cross-complaint.

The plaintiff demurs to the second count of the cross-complaint of the defendant herein, on the ground that said second count does not state facts sufficient to constitute a cause of action for a cross-complaint.

E. S. PILLSBURY,
Attorney for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

E. S. PILLSBURY,
Attorney for Defendant.

[Endorsed]: Service of within demurrer admitted this 29th day of August, 1899.

VOGELSANG & BROWN,

Attys. for Deft.

Filed August 29th, 1899. Southard Hoffman, Clerk.

At a stated term, to wit, the July term, A. D. 1899, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco on Monday, the 16th day of October, in the year of our Lord one thousand eight hundred and ninety-nine. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

WELLS, FARGO & CO.
vs.
WILLIAM WOLFF. } No. 12,711.

Order Sustaining Demurrer to Cross-Complaint.

By consent of counsel, it was ordered that demurrer to the cross-complaint herein be, and it hereby is, sustained; that defendant be and hereby is, allowed to amend cross-complaint upon its face, and that plaintiff be, and hereby is, allowed ten days to demur thereto.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF,

Defendant.

Stipulation Waiving Jury.

It is hereby stipulated by and between the parties to the above-entitled action that a jury in the said action be, and the same is, hereby waived, and that the said action may be tried by the Court sitting without a jury.

Dated San Francisco, November 7, 1900.

E. S. PILLSBURY,
Attorney for Plaintiff.

VOGELSANG & BROWN,
Attorneys for Defendant.

[Endorsed]: Filed November 8th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),

Plaintiff,

vs.

No. 12,711.

WILLIAM WOLFF,

Defendant.

Decision.

This cause came on regularly for trial on the 13th, 14th and 15th days of November, 1900, before the Court sitting without a jury, a jury having been expressly waived by written stipulation of the parties duly signed and filed. Mr. E. S. Pillsbury and Mr. Alfred Sutro appearing for the plaintiff and Mr. Alex. T. Vogelsang and Mr. I. L. Brown appearing for the defendant. Evidence, both oral and documentary, was introduced, and certain admissions of fact were made by and on behalf of the respective parties, and thereupon the cause was submitted to the Court for its decision, and now the Court being fully advised in the premises, and after having fully considered the said evidence and the said admissions, makes the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

On or about the 24th day of September, 1897, the defendant, at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff was at that time about to erect in the said city and county of San Francisco, at the rate of $2.56 per barrel. The amount of cement so contracted to be sold was not restricted to any particular number of barrels. It is not true that at said time the defendant and the plaintiff contracted for the sale of five thousand (5,000) barrels of said cement delivered at the building site of said building in the said city and county of San Francisco for the price of two and 56-100 dollars ($2.56) per barrel. It is not true that the defendant on his part performed all of the terms and conditions of the contract which the Court finds was made with the plaintiff for the sale of said cement.

II.

That plaintiff was required and was compelled to use seven thousand nine hundred and twenty-five (7,925) barrels of cement in the construction of said building.

III.

The defendant delivered to the plaintiff, for use in the construction of said building at the site of said building, five thousand barrels of Alsen's German Portland Cement

at $2.56 per barrel. The plaintiff required and was compelled to use in the construction of said building 2,925 barrels of cement in addition to the said 5,000 barrels delivered to it by the defendant. The plaintiff requested the defendant to deliver to it the cement which it was so required and compelled to use in excess of said 5,000 barrels, at the said rate of $2.56 per barrel, for use in the construction of said building, pursuant to the terms of said contract, but the defendant wholly failed, neglected, and refused to deliver to the plaintiff any more than the said 5,000 barrels under said contract.

IV.

By reason of the failure, neglect, and refusal of the defendant to furnish or deliver said 2,925 barrels of cement to the plaintiff, the plaintiff has been damaged in the sum of $2,876, without interest.

V.

With respect to the issues made by the allegations of the first counterclaim set up in the aswer of the defendant, the Court finds that the allegations of paragraphs I. II, and III thereof, are true. It is not true that on the 24th day of September, 1897, the plaintiff contracted to purchase of the defendant, and the defendant contracted to sell to the plaintiff, at the rate of two and 56-100 dollars ($2.56) per barrel, at the site of the said building of the plaintiff in the said city and county of San Francisco, five thousand (5,000) barrels of Alsen's German Portland Cement, but in this behalf the Court finds the fact to be as in finding I hereof stated. It is true that pursuant to the terms of the contract in finding I

hereof stated to have been made between the plaintiff and the defendant, but not otherwise, the defendant sold and delivered, and the plaintiff purchased, five thousand (5,000) barrels of said cement at the rate of two and 56-100 dollars ($2.56) per barrel, and the plaintiff, before the commencement of this action, became indebted to the defendant therefor in the sum of $12,800 in United States gold coin. Of said sum of $12,800 no part has been paid saving and excepting the sum of $10,534.40 on account thereof, and there is due and payable to the defendant from the plaintiff for said cement so sold and delivered the sum of $2,265.60, without interest.

VI.

With respect to the issues made by the allegations of the second counterclaim set up in the answer of the defendant, the Court finds that the plaintiff is indebted to the defendant in the sum of $2,265.60, as in finding V hereof stated, for 885 barrels of Alsen's German Portland Cement sold and delivered by the defendant to the plaintiff, and being a part of the 5,000 barrels in findings III and V hereof stated to have been sold and delivered by the defendant to the plaintiff.

And from the foregoing facts the Court finds the following

CONCLUSIONS OF LAW.

The plaintiff is entitled to judgment against the defendant for the sum of $2,876, less the sum of $2,265.60—

that is to say, the plaintiff is entitled to judgment against the defendant for the sum of $610.40, and for its costs.

San Francisco, November 20, 1900.

WM. W. MORROW,

Judge.

[Endorsed]: Filed November 20th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF,

Defendant.

No. 12,711.

Judgment.

This cause having come on regularly for trial upon the 13th day of November, 1900, being a day in the November, 1900, term of said court, before the Court sitting without a jury, a trial by jury having been waived by stipulation of the attorneys for the respective parties duly filed. E. S. Pillsbury and Alfred Sutro, Esqs., appeared on behalf of the plaintiff, and Alex. T. Vogelsang and I. I. Brown, Esqs., appeared on behalf of the defendant. Thereupon, the trial having been proceeded with on the 14th and 15th days of November in said year and term,

and the evidence, oral and documentary, upon behalf of the respective parties having been introduced, the cause was, after the arguments of the attorneys for the respective parties, submitted to the Court for consideration and decision.

And the Court, after due deliberation, having filed its findings in writing, and ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Wells, Fargo and Company, a corporation, plaintiff, do have and recover of and from William Wolff, defendant, the sum of six hundred and ten and 40-100 ($610.40) dollars, together with its costs in this behalf expended, taxed at $46.80.

Judgment entered November 20, 1900.

SOUTHARD HOFFMAN,
Clerk.

A true copy. Attest:

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed November 20, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

WELLS, FARGO & COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF,

No. 12,711.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 20th day of November, 1900.

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Judgment-roll. Filed November 20, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WELLS, FARGO & COMPANY (a Corporation),
Plaintiff,
vs.
WILLIAM WOLFF,
Defendant.
No. 12,711.

Bill of Exceptions and Statement of the Evidence.

The above-entitled cause was brought to recover damages for an alleged breach of contract, claimed to have been entered into by and between plaintiff and the defendant at San Francisco, on or about the 24th day of September, 1897. Plaintiff alleged that under said contract defendant agreed to sell to it as much of Alsen's German Portland Cement as the plaintiff should require for use in the construction of a certain building; said cement to be furnished at the rate of two and 56-100 dollars ($2.56) per barrel. The plaintiff further alleged that it had required and had been compelled to use 7,925 barrels of said cement in the construction of said building. That the defendant sold and delivered to the plaintiff 5,000 barrels of said cement, and no more, and that though often requested thereto by the plaintiff defendant wholly failed and refused to sell to plaintiff any more than said 5,000 barrels at two and 56-100 dollars ($2.56)

per barrel, or at any less rate, and alleged further that by reason of this failure and refusal plaintiff had been damaged in the sum of two thousand eight hundred and seventy-six dollars ($2,876), for which amount it prayed judgment.

Defendant denied the allegations of the complaint and set forth a counterclaim, praying for judgment against said plaintiff for the sum of two thousand two hundred and sixty-five and 60-100 dollars ($2,265.60), the price of eight hundred and eighty-five (885) barrels of said Alsen's German Portland Cement, at the rate of two and 56-100 ($2.56) per barrel.

The case came on regularly for trial on the 13th day of November, 1900, before the Hon. W. W. Morrow, Circuit Judge. E. S. Pillsbury and Alfred Sutro, Esqs., appearing as counsel for the plaintiff, and Alex. T. Vogelsang and I. I. Brown as counsel for defendant.

A jury was expressly waived by written stipulation of the parties, duly signed and filed; thereupon the following proceedings were had and testimony taken.

An opening statement to the Court was made by E. S. Pillsbury, Esq.

GEORGE E. GRAY, a witness called on behalf of plaintiff, testified as follows:

I am a director and first vice-president of Wells, Fargo & Company, and occupied that position in the year 1897, when we contemplated the construction of a building in San Francisco. We commenced the construction of that building, located on the corner of Second and Mission streets in this city, in that year, and completed it along

in 1898. I have seen the defendant, Mr. William Wolff, and have talked with Mr. Baker, the representative of Wolff & Company, in regard to Alsen's German Portland Cement to be used as material in the construction of that building I recollect a conversation with Mr. Baker.

Q. State what your conversation was with Mr. Baker.

Mr. BROWN.—We would like to interpose an objection first.

The COURT.—I suppose you will connect Mr. Baker with the defendant?

Mr. PILLSBURY.—Oh, yes, your Honor.

Mr. BROWN.—It is not for that reason. There is a preliminary question that I would like to ask the gentleman, and that is if there was a contract in writing in reference to this matter; if so, it might be that the writing, when produced, would be so clear that it would state the contract itself, and all prior negotiations would naturally be merged in it. That is why I object at this time, for the purpose of finding out what the fact is in that respect.

Mr. PILLSBURY.—We are leading up to that, your Honor. I will state that we expect to show that Colonel Gray had a conversation with a representative of this house; that pursuant to that conversation, the defendant, or Mr. Baker as his representative, wrote a letter to the plaintiff, or to Mr. Gray, as its representative, and acting upon that letter, Wells, Fargo & Company gave notice to the defendant to furnish the materials, and that materials were actually furnished pursuant to it, and paid for up to the limit of five thousand (5,000) barrels.

The COURT.—Then the contract would be based upon this letter?

Mr. PILLSBURY.—No. We say the contract is made up of the conversation and the letter. The letter refers to the conversation. It begins, "Referring to our recent conversation."

Mr. BROWN.—We will have to have the letter before the Court before we can tell.

The COURT.—We will see what it is. Mr. Pillsbury says he is leading up to it. Of course, if it is not, the Court will strike out whatever is not proper.

Mr. BROWN.—Then we will have the right to move to strike it out and we make that reservation.

The COURT.—Yes, the objection will be overruled.

Mr. BROWN.—We note an exception, and thereupon said exception to the ruling of the Court, permitting said question to be answered was allowed. (Defendants' Exception No. 1.)

(The witness, in answer to the last question, said:) It was substantially this: The question Mr. Baker desired was, that I would define accurately, some number of barrels of cement that we would want. I said to him, "I can't give you that because the architect tells me it is an uncertain quantity." The architect said to me, "I can't give it to you definitely." I told Mr. Baker what the architect said. I told him I wanted his proposition for the cement for that building, and I could not give him a positive quantity; that the architect said that un-

der certain conditions, he would require about five thousand (5,000) barrels. That is what I told Mr. Baker; that if certain other conditions existed, it would be a great deal more. On that statement to Mr. Baker, he left my office and went back to the office on Market street, as he said, and came back to me again with a written proposition which is embodied in this letter, which I recognize, and that is the letter that was received.

Q. Before offering that, Colonel Gray, I will ask you what, if anything, you told Mr. Baker, preliminarily, you contemplated doing with reference to a building, and why you were getting these bids.

Mr. BROWN.—We object, if your Honor please, to that question, for the reason that all these prior negotiations were merged in the writing. It now appears that there was a writing which was produced by Mr. Baker and given to Mr. Gray.

Mr. PILLSBURY.—No, I am simply getting at the full conversation.

Mr. BROWN.—It may be that the letter will speak for itself, and that the conversations and all prior negotiations were merged in it. Until it is in evidence, I cannot see how this can be permitted.

The COURT.—The Court has already determined that we will have the conversation leading up to the letter. Mr. Pillsbury has asked for all the conversation, and I think we shall have to take it all now.

Thereupon, the Court overruled the objection of the defendant to the question, to which the defendant excepted.

which exception was then and there allowed. (Defendant's Exception No. 2.)

(The witness continuing in answer to the question allowed, stated:) I told Mr. Baker my object was to get cement for the building, the total amount of cement we required.

The letter referred to by the witness and identified by him was then introduced in evidence and marked "Plaintiff's Exhibit No. 1," and was read to the Court. The following is a copy thereof, to wit:

Plaintiff's Exhibit No. 1.

"ALSEN'S PORTLAND CEMENT WAREHOUSE,

"Manufacturers of Portland Cement. William Wolff & Co., California Agent, 329 Market Street, San Francisco."

(This constituted the letter head. And the body of the letter reads:)

"San Francisco, California, September 24, 1897.

Colonel Geo. E. Gray, 1st Vice-President Wells, Fargo & Co., City.

Dear Sir: Referring to the conversation the writer Mr. Baker had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use in the new Wells, Fargo Building now in course of construction.

We will name you a price for what you may require, on about five thousand barrels (5,000) more or less, of two dollars and fifty-six cents ($2.56) per barrel delivered

at the building site Second & Mission Sts. in quantities to be designated by you.

We will guarantee the Alsen Cement to be of standard quality and subject to any reasonable tests you may call for.

Very respectfully,
(Signed) WILLIAM WOLFF & CO.,
Per EDMUND BAKER."

Thereupon, Mr. Brown, for the defendant, made the following motion to strike out, stating: So long as the letter is now in evidence, and for the purpose of saving the point, we will make the motion to strike out all the conversations prior to the letter, basing the motion upon this ground, that the writing is clear and unambiguous and speaks for itself, and all prior negotiations and conversations must be deemed to be merged in the writing, and that the conversations are therefore immaterial. There is no ambiguity calling for parol testimony, and it modifies and changes the said written agreement.

Said motion to strike out was then and there, by the Court, denied, to which ruling the defendant excepted, which exception was then and there allowed. (Defendant's Exception No. 3.)

(The witness thereupon continued:) After receiving this letter, I promptly advised Mr. Baker, verbally, that we would accept his proposition. My next step was to advise the architect that I had made this arrangement with Mr. Baker for the cement for the building. I advised him of my having contracted, bargained with these

people for the cement. Wolff & Company furnished the cement as we requested from time to time, in quantities as requested, until they had furnished 5,000 barrels. At the time that they decined to furnish more than 5,000 barrels, I did not know definitely, except by common report, that the price of cement had advanced. I had no conversation with Mr. Wolff, or any of the parties, until they came and demanded of me payment for a certain installment of cement, that made the last installment of the 5,000 barrels. They came to me to approve of the payment, and I declined to make the approval, as, I said, I stood upon the contract. They said they had fulfilled their contract. I differed with them and I declined to make the payment. They did not furnish any more than 5,000 barrels under this arrangement. We required more than 5,000 barrels for the construction of the building, to the extent of some 2,900 barrels. I think 2,925 was the number. I had to buy that extra 2,925 barrels in the open market, and had to pay more for it than the price mentioned in that letter, namely: Two and 56-100 dollars ($2.56) per barrel. I paid $3.55 per barrel for 2,818 barrels, and $3.30 per barrel for 107 barrels, puchasing the same in this city from Henry Cowell. My impressions are that that was cheaper than I could buy from any other dealer in this city, which was the nearest place where it could be obtained.

On cross-examination, the witness testified:

On the day that Mr. Baker first came into my office, he introduced the subject of his desire to furnish our company with cement, and he expressed a desire to fur-

nish me with cement. He asked me how much I would need. He desired me to specially name a particular quantity, and I said to him I could not give him a particular quantity. As I said before, I told him that under certain conditions, we would require at least 5,000 barrels, and I said to him that under certain conditions, we might require even less than 5,000 barrels. I do not remember saying in that conversation that it was possible that we would require but 3,000 barrels. I have no recollection whatever of that number being mentioned. If a certain form of construction we had in mind had been adopted, 3,000 barrels of cement would not have been sufficient and not near it. I suppose it was very, very close upon 5,000 barrels if we used a certain kind of terra cotta for our flooring, and if we used concrete flooring the quantity would be very much larger, but how much larger I could not tell him. Therefore, I said to him, "I will not name 5,000 barrels, except you take it upon the understanding that it is to be more or less. If I want less than 5,000 barrels"—and I didn't expect but what I should want it—"it will be all right, but if it requires more, you must give me all I want."

Q. Are you positive, Mr. Gray that you discussed the question of concrete or tile floors with Mr. Baker at that conversation?

A. Of necessity I had to say that, if I said anything, and I think we discussed the question, I did not tell him anything particularly, of the form of construction of the building, except the specifications of materials.

The only question was the question of specification of material, class of material to be used—not the quantity of material to be used—I said nothing about the quantity except the 5,000 barrels, more or less, and I want to say right here that there was no mistake with Mr. Baker about this. I want that understood. That is a part of my telling the truth and the whole truth. Mr. Baker brought that letter (Plaintiff's Exhibit No. 1) officially to me, not personally, but officially, to me as his bid. He brought it to me personally and he gave it to me then and there on the same afternoon of the day that I had this conversation with him. I do not suppose he was gone more than an hour from the office. Then I told the architect of the fact of the contract, the bargain being made with Mr. Baker, and then I instructed the architect to order the cement from Mr. Baker, or, at least, from William Wolff & Company. I did not reply to this letter in any way, in writing, but I did verbally to Mr. Baker. I am now unable to say whether it was that day or the day following. I did not show any plans or specifications, or anything of that sort connected with this work, to Mr. Baker at the time he had this conversation with me. He saw none of the plans as far as I know. It was simply a question with him as to quantity. I understood that this cement was German cement. If I am not mistaken, he advised me that he had the cement on hand. Five thousand (5,000) barrels of cement even were furnished; 885 barrels we held out; that was the last installment, and we declined to pay for them on account of this breach of contract.

Mr. Vogelsang, in response to a question put by the Court, stated that the claim for the purchase price of the 885 barrels formed the basis of another suit in this court, namely: A mechanic's lien suit, which is not quite ready for trial and which was originally filed in the State court; but the demand is counterclaimed in the suit at bar. These two suits were brought almost at the same time, one in the State court and one in this court.

(The witness, continuing, testified as follows:) I do not recollect seeing Mr. Baker again on business until he came with Mr. Wolff to plead with me to pay for the eight hundred and odd barrels. He claimed that he fulfilled his contract, and I claimed that he had not fulfilled it. I denied that he had fulfilled it because he had not given me all the cement I required for the building. He had given me 5,000 barrels. I claimed that he should have furnished all the cement I required for the building, 5,000 barrels, more or less. He endeavored to ignore the more or less proposition.

Q. Did he say anything to you about in the case of a settlement of the proposition that he would make a small delivery to cover any question of "more or less" involved in the contract?

A. After we had completed our building, Mr. Baker came to me, or sent me a proposition that he would deliver me 500 barrels, and I said: "We are not dealing in cement; I have no use for it."

Q. Is that what you said, Mr. Gray? Are you sure that is the reply you made?

A. I am sure of it.

Q. May you not have said that you would not accept 500 barrels unless he would furnish it all; that you would not take 500?

A. No, sir; I did not any such thing.

Q. You did not? A. No, sir.

Q. What time was it that he spoke to you about the 500 barrels?

A. My recollection is that he spoke to me about the 500 barrels at some period after the visit of himself and Mr. Wolff, and it was after the building was completed. It was after I had purchased this 2,925 barrels and used it in addition to the 5,000. I cannot locate the time except that it was after the interview with himself and Mr. Wolff. Presumably, the architect's certificate that the 885 barrels had been used and accepted in the building was presented to me on July 27, 1898, as appears by the date of the certificate, and that was either a little before or a little after the time that we had the discussion with reference to the nonfulfillment of the contract; but the offer of Mr. Baker to let us have 500 barrels of cement was not at or about that time, but was very much later than that, very much later—months—a good many months. It was at some period long after that certificate of the architect was given.

On redirect examination, the witness testified: Before any proposition from Mr. Baker came in reference to the 500 barrels, the building was practically completed and all the cement used. I had no use for it, and that was my answer that I could not use it. I got the extra cement from Henry Cowell. The 500 barrel proposition

only came after we had used all the cement we needed. At the time the first question arose about their furnishing any more than 5,000 barrels they did not then propose to give any more than 5,000 barrels. That was their ultimatum, that they had fulfilled their contract, and I disputed it. I told them that the reason why I did not pay for the last installment of cement was because they had not kept their agreement. I told them they had not kept their agreement because they had not delivered the amount of cement I required for the building. I stated as clearly as I could before that at the talk with Mr. Baker, the question with Mr. Baker and with me was as to the quantity, and I could not give him quantity. I told him I wanted the cement for the building, and the whole of the cement. The specifications were not completed at that time, determining the material that would be used, and it, therefore, made the question of quantity an unknown quantity. The plans were made, but the material was not decided on. After I got this letter of Wolff's (Plaintiff's Exhibit No. 1), I put that in the archives of the company in the company's vault, and there it has remained until yesterday. I was the specific officer in charge of this building business and directed it.

Mr. VOGELSANG.—Q. Let me ask you this question. Colonel Gray: These two certificates here for cement purchased of Henry Cowell and furnished by him, one dated September 6 and the other dated October 7. You mean to be understood as saying that the tender by Mr. Baker of 500 barrels in addition, to cover any deviation, or to cover the definition of "more or less," was made

to you after you had got these certificates—after you had got this cement?

A. After the cement was furnished?

Q. After this cement was furnished and after these dates?

A. I presume it was after these dates, but those certificates did not always come in exactly at the date of delivery of the cement, but usually they were very prompt.

Q. Usually they are when they want money?

A. Sometimes they differ. Sometimes I would not get it within fifteen or twenty days.

Q. Then these dates do not amount to much?

A. They don't amount to much. The point, as I stated before was, emphatically, that the 500 barrel tender was after I had used up all the cement I wanted in that building.

Counsel for the respective parties then stipulated that Wells, Fargo & Company, after the receipt of 5,000 barrels of cement from William Wolff & Company went into the open market and bought at a fair market price 2,925 barrels of cement, similar to that which was furnished by William Wolff & Company, and as nearly the same as they could get in the market at that time. That the prices given by the witness Gray were the true and correct prices, and that if plaintiff is entitled to judgment, a proper basis for computation of amount of damages is laid.

J. Y. AYER, a witness sworn on behalf of plaintiff, testified as follows:

I superintended the construction of a certain building erected by Wells, Fargo & Company at the corner of Second and Mission streets in this city, beginning in September, 1897, and completed, I believe, in the latter part of 1898. As such superintendent I received cement furnished by Wolff & Company and also by Mr. Cowell. Five thousand (5,000) barrels were furnished by Wolff & Company, and the last of those 5,000 barrels were delivered in May, 1898. I ordered the cement of William Wolff & Company as we needed it every day. The date of the last order that I gave was May 20, 1898, for 500 barrels; on May 20th, when I ordered the 500 barrels, there were 385 barrels delivered from that order, and then they stopped. The 385 barrels completed the entire lot of 5,000 barrels. They delivered that same day 200 barrels; on the 23d of May they delivered 50 barrels; and on the 26th they delivered 135 barrels, making 885 barrels for the month of May, and that made the 5,000 barrels. I ordered 500 barrels; on May 20th this order was not completed. It lacked 115 barrels. I called on May 27th, 1898, at the office of William Wolff & Company, to know if they were going to complete that order for 500 barrels. I think I saw Mr. Baker there. I am not sure whether it was Mr. Baker or Mr. Wolff, but I am sure it was one of them. I stated that I called to see if they were going to complete the order that I gave on May 20th for 500 barrels. They claimed that they had filled their contract and they would not furnish any more cement. I said I did not come there to argue that question. I said that I supposed that their contract was to furnish the cement

for the building, 5,000 barrels, more or less. They refused to furnish any more cement.

On cross-examination the witness testified: As superintendent of the building I sent in orders to William Wolff & Company for the cement as it was required, and the orders were filled, as I sent them in, up to 5,000 barrels. I had no other connection with the contract in any way. Colonel Gray was the person who officiated at the time of the original contract.

HENRY C. GEORGE, a witness sworn on behalf of plaintiff, testified:

I am manager of Henry Cowell, dealers in lime and cement, and have been manager for the past five years. In the year 1898, Henry Cowell & Company furnished cement to Wells, Fargo & Company, 2,925 barrels—it was for use in the new Wells, Fargo's building, Second and Mission streets, and was delivered there. The cement was furnished at the fair market price which prevailed at the time for the same; the larger portion at $3.55, and a small portion at $3.30 per barrel. The cement furnished by us and Alsen's German Portland Cement are both first-class German cements, and are about of the same quality.

On cross-examination the witness testified: The first delivery of the lot furnished by us was May 31, 1898, and the last delivery was made November 17, 1898. The statement from which I have refreshed my memory shows that the sale was made to Messrs. Percy and Hamilton. It was sold to Percy & Hamilton for Wells, Fargo & Company's building.

On redirect examination the witness testified:

Mr. SUTRO.—Q. Is it not the fact that it was sold through Percy & Hamilton to Wells, Fargo & Company?

A. Yes, sir.

The COURT.—Who are Percy & Hamilton?

Mr. SUTRO.—They are the architects, if your Honor please.

On recross-examination the witness testified:

Q. It was sold to Percy & Hamilton, was it not, and then, upon their order, delivered to the Wells, Fargo & Company's building?

Not on their order altogether. Mr. Ayer ordered it sometimes. I am not sure about it. I do not know of my own knowledge at what time this cement (the 2,925 barrels), was sold to Percy & Hamilton. I made the sale of this cement myself. I do not know whether it was on the same day that I made the first delivery. My impression is that Percy & Hamilton bought a large lot of 6,000 barrels some days prior to the first delivery of this cement to Wells, Fargo & Company, but I cannot tell whether this cement was any part of that 6,000 barrels. I suppose we have the contract on file. During the recess I examined the books of Henry Cowell & Company to see whether or not there was a contract with Percy & Hamilton for the furnishing of cement for Wells, Fargo's building, and I cannot find any contract at all. I find no contract at all with Percy for the furnishing of cement.

Witness identified the following receipt, which was introduced in evidence and marked "Plaintiff's Exhibit No. 2."

Plaintiff's Exhibit No. 2.

Office of Percy & Hamilton, Architects. 532 Market street.

No. 136. San Francisco, July 8, 1898.

Certificate to Wells, Fargo & Co.

This certifies that the sum of three thousand nine hundred and five dollars ($3,905) is due Henry Cowell & Co. for work done as per terms of contract.

For 1100 bbls. Portland cement delivered at Express Bldg., at $3.55 per bbl., this being the first payment on Germania cement. Total payment $3905.00 on Germania cement contract.

PERCY & HAMILTON,

Architects.

Received the amount of the above certificate.

HENRY COWELL & CO.,

Contractor.

W. H. GEORGE.

(Paid Jul. 16. 1898. Wells, Fargo & Co. Bank, San Francisco, Cal.)

(Wells, Fargo & Co. Jas. S. Bunnell, Jul. 16, 1898. Cashier Express. San Francisco.)

(Approved. Geo. E. Gray, I. Y. Ayer.)

(Plaintiff's Exhibits Nos. 3, 4, and 5 are in the same form, except the dates and amounts are different.)

GEORGE W. PERCY, a witness sworn for the plaintiff, testified as follows:

I am an architect and built the building for Wells, Fargo & Company, located at the corner of Second and

Mission streets, this city. I bought of Henry Cowell & Company, in the name of the firm of which I was a member, a large quantity of cement, 6,000 barrels, of which at the time I knew a large portion would be wanted on Wells, Fargo & Company's building, and it was sent directly from Henry Cowell's to Wells, Fargo and Company and billed to them. The cement was in the first place sold by them to me, but on my instructions they sent nearly 3,000 barrels to Wells, Fargo & Company and billed it to them. The cement used by Wells, Fargo & Company was paid for directly by them to Cowell & Company.

On cross-examination the witness testified:

With reference to the time that the contract was let for the form of flooring finally adopted in the Wells, Fargo's building, which was in the last part of December, 1897, it was several months afterward—four months at least afterward—that I made this purchase of this 6,000 barrels of cement from Davis & Cowell. It must have been as late, I think, as April, and possibly, May, 1898, that I made that contract. I signed a written agreement for 6,000 barrels of Portland cement, to be delivered on my order at different times, and dealt with Mr. George, here, in making that contract. My talk and all the agreement was made with Mr. George. He thought they would rather have a written agreement, which I signed in the name of Percy & Hamilton. Mr. George asked for the written agreement. I gave Mr. Baker general instructions to deliver cement to the building on the order of the superintendent there, Mr. Ayer or Mr. Humphrey, both

of whom represented the owners, and the general instructions were to deliver cement whenever they called for it.

Q. Who advised you to give this order to Mr. Baker?

A. Colonel Gray.

Q. Did Colonel Gray show you the letter, the proposition made by William Wolff & Company through Mr. Baker to Wells, Fargo & Company?

A. It is very probable that he did, but I cannot remember positively whether he did or not. I know the price, and that was all I cared about.

On redirect examination the witness testified:

My impressions are, then, and I am quite clear on that, that I made this purchase before the formal demand was made for any more cement and before there was a positive refusal to furnish it, and before the 5,000 barrels had been exhausted.

HENRY C. GEORGE, previously sworn for plaintiff, was recalled for the plaintiff and testified:

I want to correct a statement made in reference to my having the contract, mentioned by Mr. Percy. I cannot find the contract.

The Court then directed Mr. Percy and Mr. George to look for the contract entered into by Mr. Percy, or Percy & Hamilton, for the purchase of the 6,000 barrels.

The plaintiff then rested.

Counsel for the defendant then and there in open court entered its motion for a nonsuit and for a rule of the Court granting the same against said plaintiff.

(a) Because the contract, as plead by the plaintiff, is

at variance with the contract proved, if they attempt to prove the contract by this parol testimony.

(b) Because there is no evidence before the Court that Messrs. William Wolff & Company have broken their contract, which was to supply 5,000 barrels of cement at $2.56 per barrel.

(c) Because the evidence before the Court does not sustain the cause of action set forth in the complaint.

Said motion of defendant was then and there by the Court overruled and denied, and an exception was noted for the defendant and allowed by the Court. (Defendant's Exception No. 1.)

Thereupon ALEX. T. VOGELSANG, Esq., on behalf of the defendant, made an opening statement to the Court.

MARTIN BOZE, a witness sworn on behalf of defendant, testified:

I am employed by William Wolff & Company, and was in their employ in September, 1897. I recognize the letter which you show me (Plaintiff's Exhibit No. 1). I delivered that letter to Colonel Gray at his office in the old Wells, Fargo's building at or about September 4, 1897.

On cross-examination the witness testified:

I am positive this was the letter, because I copied it, and the stenographer enclosed it in a envelope and I took it up immediately.

WILLIAM WOLFF, sworn on behalf of defendant, testified:

I am the defendant in this action and am the plaintiff in the other action pending on the same subject matter.

I am the person referred to in the letter (referring to Plaintiff's Exhibit No. 1) as making the proposition to Wells Fargo & Company to furnish them certain cement. I made this proposition through Mr. Baker. I am in the importing and commission business at 329 Market street. At the time of this contract we were the local distributors for Alsen's cement, which is manufactured in Germany and comes here by sailing vessel.

Q. Are you a contractor to furnish cement work or are you simply a seller of the material, cement, itself?

A. We are selling agents for Portland cement. About the day this letter was written, Mr. Baker returned to the office and informed me of the sale that he had made to Wells, Fargo & Company. The sale this letter speaks of. When I was informed by Mr. Baker, I honored the orders of Wells, Fargo & Company for the delivery of cement up to 5,000 barrels.

Q. Did you set aside that amount of cement for them?

(Plaintiff's counsel objected to this question and stated that it made no difference whatever so far as any issue in the action was concerned. Counsel for defendant stated the question was proper in this respect; upon the theory that there may be an ambiguity in the writing, such an ambiguity is dissipated by the acts of the parties to the contract. If this witness states that upon the signing of that agreement and the report thereof to him, he immediately set aside, or reserved, 5,000 barrels, that is an act done by him right at the very inception, and it is conduct which would help the Court to understand the meaning which one of the parties put upon the contract.)

The COURT.—Then we would meet another difficulty. In the first place, what constitutes a setting aside? The setting aside would be the making of entry in his books at most, and the entry would be substantially—

Mr. BROWN (Interrupting).—We might change the words "setting aside" to "reserved."

The COURT.—I will sustain the objection, to which ruling of the Court defendant noted an exception, which was then and there allowed by the Court. (Defendant's Exception No. 5.)

(The witness then continued:) I saw Mr. Gray with reference to this contract about the middle of the month of June, 1898, for a settlement for the payment of the cement delivered, to wit: 885 barrels, the purchase price of which amounts to $2,665.69. I called on Mr. Gray in company with Mr. Baker. We asked for the payment of the balance due on the cement supplied, and Mr. Gray maintained that we had not fulfilled our contract. Upon asking upon what grounds he based his assertion, he said that he had purchased all the cement that was required for the erection of the building. I referred to our letter, our written agreement, and asked him, whether he did not understand, that, according to that letter, we were obliged to deliver no more than 5,000 barrels and he said no, that was not his understanding. I said to him, that at the utmost he could not claim more, according to the commercial usage, that ten per cent of the amount stated in the letter, 5,000 barrels.

The COURT.—Q. You mean ten per cent additional?

A. "More or less," your Honor.

Q. That "more or less" would be satisfied by ten per cent? A. Yes, sir.

On cross-examination, the witness testified:

We declined to deliver more than 5,000 barrels.

GEORGE W. PERCY, a witness already sworn, was recalled for the defendant and testified:

Wells, Fargo & Company's building was completed at the very last of the year, 1898, ready to be occupied in January, 1899. The last payment of cement was in November, 1898; the cement had been used sometime before that—within a month or so—prior to his departure for the east, Mr. Baker called upon me, and referred to the contract, in my office.

Q. What did he say about this at that time to you?

(Counsel for plaintiff objected to the question on the grounds of immateriality and irrelevancy. The Court permitted the witness to testify, subject to the right of counsel for plaintiff to move to have the answer stricken out.)

A. He told me he was going away to be gone some weeks; that he had caused the entire 5,000 barrels, that we should require at Wells, Fargo & Company's building, to be stored in the warehouse subject to our orders, and that it made no difference about his not being here, the orders would be filled just the same.

Mr. SUTRO.—I ask that this be stricken out. It is the same testimony that was sought to be elicited from Mr. Wolff yesterday, and your Honor ruled that it was immaterial.

And thereupon, the Court granted the motion to strike out the last answer of the witness, to which ruling defendant then and there excepted, and such exception was allowed by the Court. (Defendant's Exception No. 6.)

Witness Henry C. George thereupon returned and introduced the following agreement, as requested, and plaintiff thereupon introduced the said agreement entered into between the firm of Percy & Hamilton, of which the witness, Percy, was a member, and Henry Cowell & Company. It is headed:

"Henry Cowell & Company, Santa Cruz," etc. "Lime and Cements, 211-213 Drum Street. San Francisco, May 21, 1898."

And the body of the letter reads:

"Messrs. Percy & Hamilton,

Gentlemen: Referring to our conversation of this morning, we now confirm the sale of 5,000 barrels of Germania Cement to you at $3.50, all to be taken within ninety days. Terms, cash on delivery.

PERCY & HAMILTON,
Buyer.
HENRY COWELL & CO.,
Seller.

June 15, 1898. We hereby confirm the sale of an additional 1,000 barrels on same terms as before.

PERCY & HAMILTON.
HENRY COWELL & CO."

Mr. EDMUND BAKER, a witness sworn for the defendant, testified: I am a resident of this city and county

and the Pacific Coast Agent of the Alsen Portland Cement Works, at Hamburg, Germany, and was such agent on or about the 24th day of September, 1897, and had been such agent for about four years at that time. The Alsen Portland Cement Works are in Germany and the cement is brought to California in sailing vessels. The local agency here for the cement was William Wolff & Co. I was engaged in selling cement in the State of California, as well as in other parts of the Pacific Coast. I made sales in San Francisco, through the business house of William Wolff & Company. I remember a transaction had on behalf of William Wolff & Company with Wells, Fargo & Company. It was in the month of September, 1897, the 24th day, as I recall it. I called on Mr. Percy, of the firm of Percy and Hamilton, the architects for the new building for Wells, Fargo & Company, and told him I was under the impression, or that I knew that this building was to be erected and that a large quantity of Portland cement would be used. He told me yes, that he was the architect for the building, and that a quantity of Portland cement would be used, and that the purchase would be made by Wells, Fargo & Company direct. I called on Mr. John J. Valentine, who told me the question of the purchase of cement was in the hands of Col. Gray. I saw Colonel Gray at 3 o'clock on September 24, 1897, and introduced myself to him. I told him then that I heard they required some Portland cement. He said, "Yes." I asked him how much they would require. He said he would require 3,000 barrels, but possibly they might require 5,000 barrels. He first said 3,000 barrels,

but then he said they might require altogether 5,000 barrels. I gave him my price on 5,000 barrels of Alsen's Portland Cement, $2.56 per barrel, which was very low then. He asked me to return to my office, or go and put that proposition in writing. I immediately returned to the office of William Wolff & Company, where I had a desk and where I made my headquarters and dictated to the typewriter the proposition made to Colonel Gray. I made the proposition on the basis of 5,000 barrels, of $2.56 on 5,000 barrels. That was the conversation I had with Col. Gray. After writing that letter, I gave it to the boy who copied the letter and enclosed it in the envelope, and the boy took it to the office of Wells, Fargo & Company and delivered it by hand. The following day, or the day following that, I called on Mr. Percy. Mr. Percy had the letter that I had written to Col. Gray. It was lying on his desk beside him. He told me that if I wanted the order, Col. Gray had told him I should have it. I said very well, that I would supply the cement, according to the terms of my proposition. Prior to my going to Mr. Percy I had received no notification from Wells, Fargo & Company that they were asking for bids, or proposals, for the furnishing of cement. After writing this letter, I did not see Col. Gray until the controversy began. Col. Gray did not tell me, after the delivery of the letter, that my proposition was accepted. I did not see him. I learned of the acceptance from Mr. Percy. My transactions were all with Mr. Percy thereafter.

Q. What did you do after you were notified by Mr. Percy that they had accepted your proposal?

Mr. SUTRO.—I object on the ground that it is incompetent, irrelevant, and immaterial. "What did you do with reference to the contract," is too broad. It is merely tending to bring out the fact that I objected to.

Mr. VOGELSANG.—That is evidence of the fact, if your Honor please, that the understanding of the men at the time, months before any controversy arose, was different from what is now contended for. That would certainly, in our judgment, be good testimony as to what was intended by this contract. This is something that occurred at that particular time. It would show, as we state, exactly what his understanding was, and if it should turn out that there was really no contract, the inference would remain that it was, as we have counterclaimed it here, that goods were furnished to these people and used by them, for which they are bound to pay.

The COURT.—I do not think the testimony is relevant. The liability of these parties must be adjusted upon the contract. When that letter was written and delivered to Wells, Fargo & Co., and Mr. Baker was informed by Mr. Percy that his contract had been accepted the terms were made and that was the end of the transaction, so far as the liability of the parties was concerned.

Mr. BROWN.—If your Honor please, we agree that the contract is clear and free from all ambiguity. It seems that this is the view that your Honor takes of it now, but we have to meet the other side's theory, and, judging from the opening statement of Mr. Pillsbury, the theory on their side is that there may be some ambiguity. If

there is no ambiguity, your Honor would interpret it without any reference to outside circumstances, declarations or facts, for the purpose of construing the language of the instrument. But here we must meet their theory that is advanced already, and, it seems to us, in view of what your Honor has last said, that if, immediately upon the writing being delivered, this gentleman, after having been notified by the agent of the corporation in charge of the work, the managing agent, the architect, who has control of it all, that his proposition was accepted, goes to his place and reserves the amount that is set forth in that letter, that would tend to help the Court to remove any ambiguity, if there is any.

The COURT.—I think I can dispose of the controversy by a few questions.

In reply to questions propounded by the Court, the witness said:

I am the general agent of the Alsen Cement for the Pacific Coast, which includes California, Oregon, Washington, and Utah. All the cement for this particular section came through me. I ordered it and brought it by sailing vessel. The ordering of the cement was a matter of anticipation of several months—six months. As a rule, I did not wait for a contract in order to send for any cement. I kept a supply coming as any other person would, but at times it is very difficult to obtain it owing to a lack of cement in Europe. I endeavor to keep a supply of the cement on hand in San Francisco, in Portland, and Los Angeles and Seattle. That is, I have cement deposited in warehouses there. I have not always had that all the

time. When vessels are obtainable, I endeavor to keep a stock at those various points. It is not always possible to do so.

Mr. BROWN.—We desire to renew our question now.

The COURT.—I shall sustain the objection to the question (this refers to the question of Mr. Vogelsang) "What did you do after you were notified by Mr. Percy that they had accepted your proposition?" To this ruling of the Court defendant then and there excepted, and such exception was allowed. (Defendant's Exception No. 7.)

(The witness continuing:) I left for the east on December 12th, I think.

Q. What took place at that time? What did you say to Mr. Percy, and what did he say to you?

A. I called on Mr. Percy, as I usually did, before leaving town on my eastern trips, and in this instance, to inform him that I was holding the undelivered quantity of the 5,000 barrels for Wells, Fargo & Company, and he said very well, that was all right.

Mr. SUTRO.—I ask that that be stricken out on the ground that it is irrelevant and immaterial.

The COURT.—If the purpose of this is to prove that he understood the contract to provide for the delivery of 5,000 barrels I hold that it is irrelevant and immaterial, and I will strike it out.

And to this motion of plaintiff to strike out defendant objected, whereupon the Court ordered such answer stricken out, to which ruling of the Court defendant then

and there accepted and this exception was allowed. (Defendant's Exception No. 8.)

(The witness continuing, testified:) At the time that I called upon Mr. Gray he did not say anything to me about plans or specifications for the building, nor did he show me any, nor did I examine them.

Q. Did he tell you at that time, Mr. Baker, prior to the writing of this letter that he wished you to furnish at that price all of the cement that would be required for the building regardless of the number of barrels?

A. Five thousand barrels, he asked me to furnish. All I can say is that he requested me to give him a price on this quantity. There was no conversation between us as to the furnishing of an indefinite amount of cement. After the meeting, which resulted in the writing of this letter, I did not see him again, to have any business talk with him, until the following year when the controversy began, when I called with Mr. Wolff with the architect's certificate, dated July 27, 1898, requesting payment.

Defendant then introduced in evidence such architect's certificate, and the same was marked Defendant's Exhibit "A," and is in the following words: (Here insert Defendant's Exhibit "A.")

Defendant's Exhibit "A."

PERCY & HAMILTON,

Architects, Hobart Building, 532 Market Street, Telephone Main 5500.

San Francisco, Cal., July 27, 1898.

To Wells, Fargo & Co., San Francisco, Cal.

This is to certify that Wm. Wolff & Co., have furnished and delivered at the Express Bldg., corner of Second and Mission Sts., eight hundred and eighty-five (885) Bbs. of Alsen's Portland Cement since the date of last payment.

All of which was in good condition and has been used in the work.

PERCY & HAMILTON.

I called with Mr. Wolff on Mr. Gray with that certificate for the purpose of requesting payment for the last lot of cement. We had several times sent representatives of William Wolff & Company to collect this money, but had been unable to collect it, and we called on Col. Gray with the certificate, and Col. Gray refused to pay the bill, claiming that more cement was due him and he would hold this money on that account. I next saw Col. Gray, in reference to this contract, a few weeks later, in August. I think the last conversation I spoke of was the latter part of July. Yes, the certificate is dated July 27th. I saw him next, after the arrival of the ship "Pampa," which came in on the 4th of August, sometime while that vessel was discharging. I should say, sometime about the middle of August. On the "Pampa" was the

first cement that had arrived since April of that year, 1898. I had no arrival of cement in April. On the 15th of August, after the arrival of the ship "Pampa," I called on Mr. Gray and told him that I had an arrival of Alsen's Cement and that I would give him 500 barrels at the same rate as the 5,000 barrels I had supplied; that, although I did not feel that I was called upon to do so, at the same time rather than have any controversy at all with him, I would let him have 500 barrels. I stated to him that I had been advised by my attorney to do so. I remember when Mr. Ayer, an agent of Wells, Fargo & Company, called at the office and asked for an order for the 500 barrels of cement. I was present. A clerk of William Wolff & Company came into my office and told me a gentleman from Wells, Fargo & Company was there for an order for 500 barrels of cement; 385 barrels only were necessary to complete the 500 barrels. I told Mr. Ayer that all I had, or all William Wolff & Company had, were 385 barrels to complete his order and that was all we could give him; that we had no more cement and could give him no more. This was the 19th or 20th of May, 1897.

On cross-examination, the witness testified:

At the time of which we are speaking, William Wolff & Company were the California agents for Alsen's Portland Cement. It is necessary, in the course of my business, for me to find out by looking through the building papers—to discover what buildings are in progress of erection, or about to be erected, and to watch these building operations and to find who the architects are.

Q. You went to Mr. Percy just the same as you would in the first instance have gone to Wells, Fargo & Company, in answer to a proposal, did you not—that is, to put in a bid for the cement on that building?

A. I did not receive any notification.

Q. I say, it was just the same sort of proposition. You went to Mr. Percy to find out if you could not get a bid?

A. As Mr. Percy was architect for the building, I went to find out from him what quantity would be required, and when it would be required.

Q. You went there to find out if you could not make a bid for the building. Is that not the fact?

A. Yes, sir, I did.

Q. For the cement? A. Yes, sir.

Q. And it is just the same as if you had received a proposal from Wells, Fargo & Company, and had gone to Wells, Fargo & Company and made a bid?

A. Yes, sir.

Mr. VOGELSANG.—We object.

The COURT.—I sustain the objection.

Mr. SUTRO.—They asked him about his going to Mr. Percy, and I think this is proper cross-examination of his statement that Mr. Percy told him to go to Wells, Fargo & Company. I am saying that if he had received a proposal, he would have gone to Wells, Fargo & Company in the first instance.

The COURT.—If that is all you mean, that is all right. That is not very material one way or the other.

Mr. VOGELSANG.—I cannot see how he can tell whether under different circumstances he might have done something else.

The COURT.—Well, it is in.

(The witness continuing, testified:)

Colonel Gray said at first 3,000 barrels would be required for the building; that he might possibly want more, and specified from three to five thousand barrels. At first he said 3,000, and afterwards he said he might require an amount that would equal 5,000. Colonel Gray told me they would need 5,000 barrels and did not say anything to me with reference to the floors of the building. He did not tell me that the material for the floors had not been decided upon. He did not mention to me that they might even use terra cotta or cinder concrete. I have no recollection of anything of the kind. He said nothing of the kind, at all.

Q. May he have said it?

A. I think not, sir, because we had very few minutes of conversation and I doubt very much if he had time to say it. When Mr. Ayer called on me on the 29th of May, 1897, he asked me to deliver 500 barrels of cement to Wells, Fargo & Company. I refused to deliver 500 barrels. I refused to deliver 115 barrels but not 500 barrels, because I had 385 barrels. I refused to deliver the full quantity of 500 barrels. When I first went to Mr. Percy, he did make a suggestion to me as to about how much cement would be required in that building; he said about 3,000 barrels. It was in August, 1898, at the time that I

went to see Col. Gray, that I got the advice of counsel that I could deliver 500 barrels more.

Mr. VOGELSANG.—Q. And that was the first time since April that you had any cement?

Mr. SUTRO.—I object to that question.

The COURT.—The Court has a suspicion from what had already been brought out that they had no cement before August.

Mr. SUTRO.—He testified that he went to Colonel Gray under the advice of counsel.

The COURT.—It is always a mistake to go upon the theory that the Court will be guided by the technical rules applying to the subject matter. Substantial justice is what the Court must determine, without regard to these technical matters.

Mr. SUTRO.—That is all, your Honor, except there is one other matter to which I would like to refer, and that is this: Mr. Wolff, in the answer which he has corrected, said, after the portion corrected: "I said to him that at the utmost he could not claim more, according to the commercial usage, than ten per cent of the amount stated in the letter, 5,000 barrels." If that is to be construed as in any way a statement of custom, I would like to put in rebuttal testimony.

The COURT.—The Court will not proceed upon that theory.

Mr. SUTRO.—Very well. Then that is the case.

The foregoing constitutes all the testimony taken, all

the admissions of fact made and the whole evidence upon the trial of the above-entitled cause.

The cause was thereupon argued by the respective parties counsel and submitted to the Court; whereupon the Court rendered judgment in favor of the plaintiff for the sum of six hundred and ten and 40-100 dollars ($610.40) and costs of suit, and ordered findings in accordance therewith.

Thereupon the following findings of fact and decisions were duly signed and filed:

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

WELLS, FARGO & COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF.

Defendant.

No. 12,711.

Decision.

This cause came on regularly for trial on the 13th, 14th, and 15th days of November, 1900, before the Court sitting without a jury, a jury having been expressly waived by written stipulation of the parties duly signed and filed, Mr. E. S. Pillsbury and Mr. Alfred Sutro appearing for the plaintiff and Mr. Alex. T. Vogelsang and Mr. I. I. Brown appearing for the defendant. Evidence, both oral and documentary, was introduced, and certain admissions of fact

were made, by and on behalf of the respective parties, and thereupon the cause was submitted to the Court for its decision, and now the Court being fully advised in the premises, and after having fully considered the said evidence and the said admissions, makes the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

On or about the 24th day of September, 1897, the defendant, at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff was at that time about to erect in the said city and county of San Francisco, at the rate of $2.56 per barrel. The amount of cement so contracted to be sold was not restricted to any particular number of barrels. It is not true that at said time the defendant and the plaintiff contracted for the sale of five thousand (5,000) barrels of said cement delivered at the building site of said building in the said city and county of San Francisco for the price of two and 56-100 dollars ($2.56) per barrel. It is not true that the defendant on his part performed all of the terms and conditions of the contract which the Court finds was made with the plaintiff for the sale of said cement.

II.

The plaintiff was required and was compelled to use seven thousand nine hundred and twenty-five (7,925) barrels of cement in the construction of said building.

III.

The defendant delivered to the plaintiff, for use in the construction of said building, at the site of said building, five thousand barrels of Alsen's German Portland Cement at $2.56 per barrel. The plaintiff required and was compelled to use in the construction of said building, 2,925 barrels of cement in addition to the said 5,000 barrels delivered to it by the defendant. The plaintiff requested the defendant to deliver to it the cement which it was so required and compelled to use in excess of said 5,000 barrels, at the said rate of $2.56 per barrel, for use in the construction of said building, pursuant to the terms of said contract, but the defendant wholly failed, neglected, and refused to deliver to the plaintiff any more than the said 5,000 barrels under said contract.

IV.

By reason of the failure, neglect, and refusal of the defendant to furnish or deliver said 2,925 barrels of cement to the plaintiff, the plaintiff has been damaged in the sum of $2,876, without interest.

V.

With respect to the issues made by the allegations of the first counterclaim set up in the answer of the defendant, the Court finds that the allegations of paragraphs I,

II, and III thereof are true. It is not true that on the 24th day of September, 1897, the plaintiff contracted to purchase of the defendant, and the defendant contracted to sell to the plaintiff, at the rate of two and 56-100 dollars ($2.56) per barrel, at the site of the said building of the plaintiff in the said city and county of San Francisco, five thousand (5,000) barrels of Alsen's German Portland Cement, but in this behalf the Court finds the facts to be as in finding I hereof stated. It is true that pursuant to the terms of the contract in finding I hereof stated to have been made between the plaintiff and the defendant, but not otherwise, the defendant sold and delivered and the plaintiff purchased five thousand (5,000) barrels of said cement at the rate of two and 56-100 dollars ($2.56) per barrel, and the plaintiff before the commencement of this action became indebted to the defendant therefor in the sum of $12,800 in United States gold coin. Of said sum of $12,800, no part has been paid saving and excepting the sum of $10,534.40 on account thereof, and there is due and payable to defendant from the plaintiff for said cement so sold and delivered the sum of $2,265.60, without interest.

VI.

With respect to the issues made by the allegations of the second counterclaim set up in the answer of the defendant, the Court finds that the plaintiff is indebted to the defendant in the sum of $2,265.60, as in finding V hereof stated, for 885 barrels of Alsen's German Portland Cement sold and delivered by the defendant to the

plaintiff, and being a part of the 5,000 barrels in findings III and V hereof stated to have been sold and delivered by the defendant to the plaintiff.

And from the foregoing facts the Court finds the following

CONCLUSIONS OF LAW.

That plaintiff is entitled to judgment against the defendant for the sum of $2,876, less the sum of $2,265.60, that is to say, the plaintiff is entitled to judgment against the defendant for the sum of $610.40 and for its costs.

San Francisco, November 20th, 1900.

WM. W. MORROW,
Judge.

And in due time, defendant reserved his exceptions separately to finding 1, finding 3, finding 4, finding 5, and the conclusion of law in such findings and decision contained, and each and all of such exceptions were then and there allowed by the Court. (Defendant's Exception No. 9.)

And now in the furtherance of justice and that right may be done, defendant presents the foregoing as his bill of exceptions in this case and also as his statement of the evidence, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

VOGELSANG & BROWN,
Attorneys for Defendant.

Plaintiff's proposed and allowed amendments having been engrossed in the foregoing bill of exceptions and statement of the evidence:

It is hereby stipulated that the same is correct, and that it may be allowed by the Judge, as correct.

Dated April 16th, 1901.

E. S. PILLSBURY,

ALFRED SUTRO,

Attorneys for Plaintiff.

The foregoing bill of exceptions and statement of the evidence having embodied plaintiff's proposed and allowed amendments, and the same being correct, I do hereby allow the same as the engrossed bill of exceptions and statement of the evidence in the above-entitled cause.

Dated this 17th day of April, 1901.

WM. W. MORROW,

Judge.

[Endorsed]: Filed April 17, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Northern District of California, Ninth Circuit.

WELLS, FARGO & COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF.

Defendant.

Petition of Defendant for an Order Allowing a Writ of Error.

William Wolff, the defendant in the above-entitled action, being aggrieved by the decision of the Court and the judgment entered in said action on the 20th day of November, 1900, in pursuance of said decision, whereby it was adjudged that the plaintiff do have and recover the sum of six hundred and ten and 40-100 dollars ($610.40) damages and his costs in said action, comes now by Messrs. Vogelsang & Brown, his attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, on the ground set forth in the assignment of errors annexed hereto; and also for an order fixing the amount of security, which said defendant shall give upon said writ of error, and directing that upon the giving of such security, further proceedings be

stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

And your petitioner will ever pray.

VOGELSANG & BROWN,
Attorneys for Defendant.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM WOLFF,
Plaintiff in Error.
vs.
WELLS, FARGO & COMPANY (a Corporation),
Defendant in Error.

Assignment of Errors.

Now comes William Wolff, the plaintiff in error herein, by Messrs. Vogelsang & Brown, his attorneys, and specifies the following as the errors upon which he will rely and will urge upon his writ of error in the above-entitled cause.

I.

That the United States Circuit Court for the Northern District of California erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness, George E. Gray:

"Q. State what your conversation was with Mr. Baker." And in admitting in evidence the answer of witness in substance: "The question Mr. Baker desired

was, that I would define accurately, some number of barrels of cement that we would want. I told him I wanted his proposition for the cement for that building, and I could not give him a positive quantity; that the architect said that under certain conditions, he would require about five thousand (5,000) barrels. That is what I told Mr. Baker; that if certain other conditions existed, it would take a great deal more. On that statement to Mr. Baker, he left my office and went back to the office on Market street, as he said, and came back to me again with a written proposition which is embodied in this letter, which I recognize, and that letter was received."

II.

That the said Circuit Court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness, George E. Gray:

"Q. Before offering that, Colonel Gray, I will ask you, what, if anything, you told Mr. Baker, preliminarily, you contemplated doing with reference to a building, and why you were getting these bids?"

And in admitting in evidence the answer of witness in substance: "I told Mr. Baker my object was to get cement for the building, the total amount of cement we required."

III.

That the said Court erred in overruling and denying the motion made by counsel for the plaintiff in error, after the introduction in evidence "Plaintiff's Exhibit No. 1," to strike out the conversations between the witness,

George E. Gray, and Edmund Baker, prior to the said letter, upon the following grounds:

(a) That the said writing, to wit, "Plaintiff's Exhibit No. 1," is clear and unambiguous and speaks for itself.

(b) All prior negotiations and conversations must be deemed to be merged in the said writing.

(c) The parol testimony offered and in evidence modifies *the changes the* said writing and agreement.

The objectionable part of said conversations is in substance, the answers set forth in assignments II and III.

IV.

The said Court erred in overruling and denying the motion of counsel for plaintiff in error for a nonsuit made at the point during the trial of said cause, when counsel for defendant in error announced for the defendant in error, a rest as to all its evidence.

V.

That the said Court erred in refusing to permit the witness, William Wolff, to answer the following questions, asked by counsel for plaintiff in error:

"Q. Did you set aside that amount of cement for them, or did you reserve that amount of cement for them?"

And in not permitting the witness to answer that he reserved five thousand (5,000) barrels.

VI.

That the said Court erred in granting the motion made by counsel for defendant in error to strike out the following answer of witness, George W. Percy:

"A. He told me he was going away to be gone some weeks; that he had caused the entire five thousand (5,000) barrels that we should require at the Wells, Fargo & Company's building, to be stored in the warehouse, subject to our orders."

VII.

That the said Court erred in refusing to permit the witness, Edmund Baker, to answer the following question asked by counsel for plaintiff in error:

"A. What did you do after you were notified by Mr. Percy that they had accepted your proposal?"

And in not permitting the witness to answer that he immediately reserved five thousand (5,000) barrels.

VIII.

That the said Court erred in granting the motion of counsel for defendant in error to strike out the following answer of the witness, Edmund Baker:

"A. I called on Mr. Percy, as I usually did before leaving town on my eastern trips and in this instance, and informed him that I was holding the undelivered quantity of 5,000 barrels for Wells, Fargo & Company, and he said, very well, that was all right."

IX.

That the said Court erred in finding that on or about the 24th day of September, 1897, the defendant, at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much of Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff

was at that time about to erect in said city and county of San Francisco, at the rate of two and 56-100 dollars ($2.56) per barrel, because there is no evidence to justify the same.

X.

That the said Court erred in finding that the amount of cement, so contracted to be sold, was not restricted to any particular number of barrels, because there is no evidence to justify the same.

XI.

That the said Court erred in finding that it is not true that at said time the defendant and the plaintiff contracted for the sale of 5,000 barrels of said cement delivered at the building site of said building in said city and county of San Francisco for the price of two and 56-100 dollars ($2.56) per barrel, because there is no evidence to justify the same.

XII.

That the said Court erred in finding that it is not true that the defendant on his part performed all of the terms and conditions of the contract, which the Court finds was made with the plaintiff, for the sale of said cement; because there is no evidence to justify the same; on the contrary, the evidence proves without conflict, that the said defendant, on his part, performed all of the terms and conditions of the contract which was made with the plaintiff for the sale of said cement.

XIII.

That the said Court erred in finding that on or about the 24th day of September, 1897, the defendant at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff was at that time about to erect in the said city and county of San Francisco, at the rate of $2.56 per barrel. The amount of cement so contracted to be sold was not restricted to any particular number of barrels. It is not true that at said time the defendant and the plaintiff contracted for the sale of five thousand (5,000) barrels of said cement delivered at the building site of said building in the said city and county of San Francisco for the price of two and 56-100 dollars ($2.56) per barrel. It is not true that the defendant on his part performed all of the terms and conditions of the contract which the Court finds was made with the plaintiff for the sale of said cement, because there is no evidence to justify the same.

XIV.

The Court erred in finding that the plaintiff requested the defendant to deliver to it the cement which it was so required and compelled to use in excess of said five thousand (5,000) barrels at the said rate of two and 56-100 dollars ($2.56) per barrel for use in the construction of said building, pursuant to the terms of said contract, but defendant wholly failed, neglected, and refused to

deliver to the plaintiff any more than the said 5,000 barrels under said contract, because there is no evidence to justify the same.

XV.

That the said Court erred in the finding set forth as paragraph three (3) of the findings of fact herein, on the ground that there is no evidence to justify the same.

XVI.

That the said Court erred in finding that by reason of the failure, neglect, and refusal of the defendant to furnish or deliver said 2,925 barrels of cement to the plaintiff, the plaintiff has been damaged in the sum of two thousand eight hundred and seventy-six dollars ($2,876) without interest because there is no evidence to justify the same.

XVII.

That the said Court erred in finding that it is not true on the 24th day of September, 1897, plaintiff contracted to purchase of the defendant, and the defendant contracted to sell to the plaintiff at the rate of two and 56-100 dollars ($2.56) per barrel, at the site of the said building of the plaintiff in said city and county of San Francisco, 5,000 barrels of Alsen's German Portland Cement, on the ground that there is no evidence to justify the same.

XVIII.

That the said Court erred in its conclusion of law that the plaintiff is entitled to judgment against the defendant for the sum of two thousand eight hundred and seventy-six ($2,876) dollars, less the sum of two thousand two hundred nd sixty-five and 60-100 dollars ($2,265.60), that is to say, the plaintiff is entitled to judgment against the defendant for the sum of six hundred and ten and 40-100 dollars ($610.40), and for its costs.

XIX.

That the said Court erred in its conclusion of law that plaintiff is entitled to judgment against defendant for the sum of six hundred and ten and 40-100 dollars ($610.40).

VOGELSANG & BROWN,

Attorneys for Plaintiff in Error and Defendant.

[Endorsed]: Receipt of a copy of the within petition for writ of error and assignment of error and due service of the same is hereby admitted December 20th, 1900.

E. S. PILLSBURY,

ALFRED SUTRO,

Attorneys for Plaintiff and Defendant in Error.

Filed December 21, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1900, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Friday, the 21st day of December in the year of our Lord one thousand nine hundred. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

WELLS, FARGO and COMPANY (a Corporation),
vs.
WILLIAM WOLFF. } No. 12,711.

Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of I. I. Brown, Esq., attorney for defendant, and on consideration of a petition of said defendant for an order allowing a writ of error to have the judgment of this Court herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and of an assignment of errors filed herein this day, it is ordered that said defendant be, and hereby is, allowed to prosecute a writ of error to have the judgment of this Court herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and it is ordered that the amount of the bond to be given by said defendant upon said writ of error (supersedeas and for costs) be, and hereby is, fixed at the sum of $1,500.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF.

Defendant.

No. 12,711.

Bond on Writ of Error.

Know all men by these presents, that we, William Wolff, as principal, and R. H. Swayne and J. G. Hoyt, as sureties are held and firmly bound unto Wells, Fargo and Company (a corporation) in the full and just sum of fifteen hundred ($1500) dollars, to be paid to the said Wells, Fargo and Company (a corporation), their attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 22d day of December, in the year of our Lord one thousand nine hundred.

Whereas, lately at a session of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said Court, between said Wells,

Fargo and Company, as plaintiff and said William Wolff as defendant, a judgment was rendered against the said defendant, and the said William Wolff, having obtained from said Court a writ of error to reverse the judgment in the aforesaid cause, and a citation directed to the said Wells, Fargo and Company (a corporation) is about to be issued, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 19th day of January next:

Now, the condition of the above obligation is such, that if the said William Wolff shall prosecute said writ of error to effect, and shall answer all damages and costs that shall be awarded against him if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM WOLFF. [Seal]

R. H. SWAYNE. [Seal]

J. G. HOYT. [Seal]

Signed and sealed in the presence of:

W. B. BEAIZLEY.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

R. H. Swayne and J. G. Hoyt, being duly sworn, each for himself, deposes and says that he is a householder in said District, and is worth the sum of fifteen hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

R. H. SWAYNE.

J. G. HOYT.

Subscribed and sworn to before me this 22d day of December, A. D. 1900.

[Seal] W. B. BEAIZLEY,

Deputy Clerk United States Circuit Court, Northern District of California.

[Endorsed]: Form of bond and sufficiency of securities approved.

WILLIAM W. MORROW,

Judge.

Filed December 22, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF.

Defendant.

No. 12,711.

Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing written pages, numbered from 1 to 68, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $12.95, and that said amount was paid by William Wolff, defendant and plaintiff in error.

In testimony whereof, I have hereunto set my hand,

and affixed the seal of said Circuit Court, this 26th day of April, A. D. 1901.

[Seal] SOUTHARD HOFFMAN,

Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

By W. B. Beaizley,

Deputy Clerk.

[Ten Cent U. S. Int. Rev. Stamp. Canceled.]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between William Wolff, plaintiff in error, and Wells, Fargo and Company (a corporation), defendant in error, a manifest error hath happened, to the great damage of the said William Wolff, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if

judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 19th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand nine hundred.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

By W. B. Beaizley,

Deputy Clerk.

Allowed by:

WM. W. MORROW,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 22d day of December, 1900.

E. S. PILLSBURY,

ALFRED SUTRO,

Attorneys for Defendant in Error and Plaintiff.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of the said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,

Clerk.

[Endorsed]: No. 12,711. Circuit Court of the United States, Ninth Circuit, Northern District of California. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co. (a corporation), Defendant in Error. Writ of Error. Filed December 22, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Wells, Fargo and Company (a Corporation), Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 19th day of January next, pursuant to a writ of error in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action, numbered 12,711, wherein William Wolff is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 22d day of December, A. D. 1900.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this 22d day of December, 1900.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Defendant in Error and Plaintiff.

[Endorsed]: No. 12,711. Circuit Court of the United States, Ninth Circuit, Northern District of California. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co. (a Corporation), Defendant in Error. Citation. Filed December 22, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 698. In the United States Circuit Court of Appeals for the Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo and Company, a Corporation, Defendant in Error. Transcript of Record. In Error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed April 30, 1901.

F. D. MONCKTON,
Clerk.

No. 698.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,

Plaintiff in Error,

v.

WELLS, FARGO AND COMPANY, A CORPORATION,

Defendant in Error.

Reply Brief for Defendant in Error.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Defendant in Error.

Filed this.....day of December, 1901.

.....

Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

WILLIAM WOLFF,
Plaintiff in Error,

v.

WELLS, FARGO AND COMPANY, A CORPORATION,
Defendant in Error.

No. 698.

Reply Brief for Defendant in Error.

In our Opening Brief we have fully considered all the specifications of errors assigned by the plaintiff in error. By the judgment in this action the defendant in error was awarded certain rights which it claimed under a contract made between it and the plaintiff in error. These rights would never have been questioned or denied by the plaintiff in error, had not the article, which was the subject of the contract, risen in price in the open

market before the full quantity, agreed upon and required by the defendant in error, had been delivered by the plaintiff in error.

In the first place, we contended that, inasmuch as the parties to this action stipulated that the same should be tried by the court without a jury, they bound themselves to accept as conclusive the facts found by the trial court. To this well settled rule the plaintiff in error seeks to make the present case an exception. He says (Reply Brief, p. 2): "On both those occasions, as well as now, we pointedly maintained that there was no evidence to sustain certain special findings * * *." If it were true that there was an entire absence of evidence to support certain special findings, as claimed, then this contention would be sound. But, assuming that the letter of September 24th, 1897, is the only evidence to support these findings, its very existence in the record is sufficient to entirely overcome the statement that there is a complete want of evidence. The cases of **King v. Smith**, 110 Fed. 95, and **Dooley v. Pease**, 180 U. S. 126, cited by plaintiff in error, but reaffirm the rule that it is only when there is an **entire want** of evidence upon which to base a fact, that the findings of the trial court will not be regarded as conclusive.

In **King v. Smith**, supra, this Honorable Court said:

> "The finding that the plaintiff in the action is the owner and entitled to the possession of the property described in the complaint is clearly a general finding of the ultimate facts of ownership and right of possession, and is **conclusive here, unless there was entire want of evidence upon which to base it.**"

In **Hathaway v. First Nat. B'k,** 134 U. S. 494, the Supreme Court said, at page 498:

> "The first three assignments of error allege errors merely in the findings of fact by the court. **Those errors are not subject to revision by this court, if there was any evidence upon which such findings could be made.**"

It is now well settled that when parties stipulate to try a case before the court without a jury, they bind themselves to accept as conclusive the findings by the court of the ultimate facts. In **Dooley v. Pease,** 180 U. S. 126, the Supreme Court said that, where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, **it matters not how convincing the argument that upon the evidence the findings should have been different.**

The defendant in error believes that it is justified in earnestly and respectfully urging the application to the case at bar of the rule regarding the conclusive character of the findings of the ultimate facts. It is endeavoring to preserve certain rights secured to it under a contract fairly and deliberately entered into between it and the plaintiff in error. Of these rights the plaintiff in error is seeking to deprive it by a strained and unwarranted construction of the language of a writing, the obligations of which he is trying to avoid, because to have carried them out would have caused him a financial loss—a construction, we may add, which is entirely unsupported by precedent or authority.

We next contended in our Opening Brief that no error was committed in the admission or rejection of certain evidence. The questions of law presented by specifications of error 1, 2, 3, 4, 5, 6 and 7, and which relate to the evidence, we have endeavored to present in subdivisions II, IV, V and VII of our Opening Brief. Plaintiff in error in his Reply Brief (p. 2) says that he will adopt our statement, that the trial court did not regard as material or relevant the testimony, which was objected to. On page 6 of the Reply Brief it is said: "* * * it inevitably follows that the Court did not regard the previous conversation as material or relevant to the matter in hand. The Court, apparently, reached its own interpretation by a process of reasoning based on the terms of the writing alone" etc. If the objectionable evidence was not considered by the Court below, then, we again respectfully submit, as pointed out in subdivision VII of our Opening Brief, that the judgment should not be reversed. Plaintiff in error argues that parol evidence cannot be introduced to vary the terms of a written instrument. Reed v. Ins. Co., 95 U. S. 23, and thirteen other cases, are cited in support of this contention. The rule, however, has no application to the facts of the case at bar. To our contention that the evidence of the conversation was properly admitted, because the writing itself refers to the conversation, plaintiff in error has made no reply. In support of this contention we cited several cases on pages 4 and 5 of our Opening Brief. Plaintiff in error has attempted to show that these cases are inapplicable, by pointing out a distinction between the facts of each case and those of the case at bar. In

each of the cases, however, the essential feature—the reference to a conversation in a writing,—is present, and for that reason each one of those cases is pertinent. Moreover, they amply sustain the ruling of the trial court. **Godkin v. Monahan,** 83 Fed. 116, cited on page 12 of the Reply Brief of plaintiff in error, and **N. W. Fuel Co. v. Bruns,** 45 N. W. 669, and the other cases cited on pages 14 and 15, merely reaffirm the rule that parol evidence cannot vary the absolute terms of a written contract.

So far as the letter of September 24th, 1897, is concerned, plaintiff in error in his Reply Brief has **not cited a single authority** in support of the construction which he is seeking to give this letter. He says (**Reply Brief,** p. 24): "We think the writing readily and fairly comes under the second general rule of the **Brawley** case." The second general rule stated by Mr. Justice Bradley is as follows:

> "**But when no such independent circumstances are referred** to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight."

Applying the test of this rule to the letter in the case at bar, we find that the letter lacks the first vital and essential feature to bring it within the conditions of the

rule. **Independent circumstances are referred to in the letter,** and those independent circumstances are the construction of a new building and the supply of the cement that may be required therefor. The letter, therefore, cannot be classed under the second general rule.

On the other hand, we contend that the cases of **Brawley v. United States,** 96 U. S. 168, and **Budge v. United Smelting & Refining Co.,** 104 Fed. 498, and the other cases cited by us under subdivision III of our Opening Brief, conclusively establish that the letter of September 24th, 1897, was a contract to furnish as much cement as the defendant in error should require for use in its building. The letter submits a quotation on Alsen's German Portland Cement for use in a new building then in course of construction. It names a price for what may be required, on about 5,000 barrels, more or less, of $2.56 per barrel, delivered at the building site. In the language of this Honorable Court in the **Budge** case, the contract was

> "one of those in which the contracting parties had in mind the construction of a particular work, and the supply of the necessary material therefor, the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated."

The case of the "miller" instanced by Mr. Justice Bradley to illustrate the third general rule stated by him in the **Brawley** case, and quoted by us on page 20 of our Opening Brief, precisely covers the case at bar.

It is clear that the substantial engagement was to furnish as much cement as should be required for use

in the new Wells, Fargo and Company Building, and that the quantity designated, 5,000 barrels, is to be regarded merely as an estimate of what, at the time, the plaintiff in error supposed might be required. The argument with reference to change of plans and bad faith on the part of the defendant in error is, we respectfully submit, entirely out of place. Had there been any change in the plans or had the defendant been guilty of bad faith, the plaintiff in error could, in his answer, have made such change of plans and bad faith a special defense. But there is not even a hint or a suggestion of either in the entire record.

To the remarks of plaintiff in error that we have pursued an "obnoxious course" (Reply Brief, p. 16), we deem it unnecessary to reply, because beyond the mere general charge, no instance of our wrong-doing is cited. But we do most earnestly and emphatically maintain and respectfully submit and contend, that when a merchant contracts to sell an article of merchandise at a given figure, he will not be permitted to avoid the obligations of his contract because, before the contract is completed, the price of the article he has contracted to deliver has risen in the market. As the learned judge of the Court below, in delivering his opinion, very properly remarked:

> "Mr. Wolff thought it would be profitable to secure a contract to sell the cement required for this building. The contract was made. He agreed to deliver the cement, and to this he must be held."

We earnestly and respectfully submit that the judgment should be affirmed.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Defendant in Error.

No. 698.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,

Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY (a corporation),

Defendant in Error.

Reply Brief of Plaintiff in Error.

VOGELSANG & BROWN,
Attorneys for Plaintiff in Error.

Pernau Bros. Print, 543 Clay St., S. F.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF, Plaintiff in Error, vs. WELLS, FARGO & COMPANY (a corporation), Defendant in Error.	No. 698.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Upon the conclusion of the oral argument had in the above entitled cause on October 29th, 1901, counsel for plaintiff in error, obtained leave of this Court to file a brief in reply herein.

Counsel for defendant in error have devoted the first part of their brief to an examination of rules and authorities utterly inapplicable to the question of law, at this time sought to be raised by the plaintiff in error, with respect to the assignments leveling an attack at the special findings and the judgment based thereon. Neither in our opening brief, nor upon the oral argu-

ment, did we pray this appellate Court to review the character of the evidence, or to weigh the same. On both those occasions, as well as now, we pointedly maintained that there was *no evidence* to sustain certain special findings described in Specifications IX and X; and that the Court erred in its conclusion of law from them derived (trans. pp. 73–4, 77; op. br. pp. 8–9).

Obviously, this is altogether a different contention from the one argued at length by opposing counsel; and it will be considered on a writ of error in a case tried to the Circuit Court under a written stipulation waiving a jury. The law was so announced by this Court in the very recent case of *King* vs. *Smith*, 110 Fed. 95.

Dooley vs. *Pease*, 180 U. S. 126.

As intimated by opposite counsel, we assume that the Court below must find support for the obnoxious findings, assigned as error, in the letter of September 24th, 1897. Now, our position is not only warranted but sanctioned and sustained by the express ruling of the trial Court itself. We accept *in haec verba*, the assertion of counsel stated on page 30 of their brief: " The Court declared that in its opinion the letter of " September 24th, 1897, determined the liability of the parties." (See trans. p. 54.) " It appears, therefore, " that the trial Court did not consider the parol testi- " mony material or relevant."

The Court below by this express and unequivocal action taken during the progress of the trial established

two propositions safe beyond dispute here of either party to the controversy. Firstly, it thus decided that the letter of September 24th, 1897, coupled with the unconditional acceptance thereof by Wells, Fargo & Co., constituted the contract between the parties, to the exclusion of all else. Undoubtedly, the Court concluded that all the rest of the material and relevant evidence in the transcript simply touched the question of performance under the contract, after having reached the determination that the writing and its acceptance, constituted such contract. Secondly, it deemed the writing plain and unambiguous; in itself determining the engagement assumed by the plaintiff in error.

This ruling of the Court, to our minds, leaves open for consideration but one basic point. Did the trial Court err in its construction of this writing?

In our opening, we have fairly presented what we conceived to be the true and correct meaning of this writing. We then discussed the entire matter under the argument touching a review of Specifications 1, 2, 3, a, b and c (op. br. pp. 9–23). Having once fully considered this question in a review of certain assignments, it would have served no useful purpose to have repeated the argument in a mere formal way, while dealing with the remaining specifications relating to the special findings. In the best interests of brevity, it proved sufficient to direct the attention of this Court immediately to the one key question which lay at the entering threshold of the case at bar, knowing well that

the reasoning employed in the one instance would be properly applied to all other pointed specifications of error correctly assigned.

But the two reasons advanced by defendant, in order to uphold the correctness of the rule allowing the questions propounded to Mr. George E. Gray, as well as the answers given thereto, cannot prevail, in the light of the Court's decision that the writing determined the liability of the parties.

They urge as the first reason, that "the evidence of " witness Gray did not alter, or modify, or add to, or " contradict the letter of September 24th, 1897. It " simply explained the letter, and it was properly ad- " mitted under the rule that parol evidence is admissible " to explain a writing by a reference to the circumstances " under which it was made" etc. (deft's. br., pp. 9–13.) The rule, just stated, is well recognized. But, with deference, we urge that it has no application in the present instance. The absolute announcement of the trial Judge, above mentioned, supports us in our declaration that there was nothing in the writing requiring any explanation by a reference to *previous conversations between the parties.* And it is noteworthy, in no portion of their brief dealing with this branch of their case, have counsel indicated any specific part of the letter which the conversation "simply explained"—as they say. We submit, that the objectionable statement of Mr. Gray that he told Mr. Baker, "my object was to " get the *total* amount of cement we required" instead

of *explaining* a plain writing, and being consistent with it, tended [by this proof of circumstances (?)] to add to and vary it; and, indeed, to substitute a new and different engagement inconsistent with the one agreed upon in the writing itself. And the legal effect of a contract is as much within the protection of the rule which forbids the introduction of parol evidence as is its language (*Blake Mfg. Co.* vs. *Jaeger*, 81 Mo. App. 239; *Barry* vs. *Ransom*, 2 Kern. (N. Y.) 464.)

Reed vs. *Ins. Co.*, 95 U. S. 23, tendered as an authority on this point, by defendant in error, expressly approves of the old established doctrine that

> " A written agreement cannot be varied (by addition or subtraction) by proof of the circumstances *out of which it grew and which surrounded its adoption.*"

See also

Empire St. Co. vs. *Heller*, 61 Fed. 280;
N. Y. Life Ins. Co. vs. *McMaster*, 87 Fed. 63, 71;
Wrought Iron R. Co. vs. *Graham*, 80 Fed. 474;
Godkin vs. *Monahan*, 83 Fed. 116, 119;
Reid vs. *Diamond Plate Co.*, 85 Fed. 193;
Tuggle vs. *Callison*, 45 S. W. 291;
Minnesota Thresher Co. vs. *Grant Co*, 81 Mo. App. 255;
Dean vs. *Washburn etc. Co.*, 58 N. E. 162;
Rough vs. *Breitung*, 75 N. W. 147;
Janes vs. *Ferd Heim B'g Co.*, 44 S. W. 896;
Williams vs. *Hood*, 11 La. Ann. 113;
Barry vs. *Ransom*, 2 Kern. (N. Y.) 462.
Brite vs. *Mt. Airy M'f'g. Co.*, 39 S. E. 634.

They urge as the second reason for admitting the evidence, "because the letter refers to the conversation". They ask, "Could the trial Court have given the letter " a proper construction without evidence of the conver- " sation which the parties had in mind?"

In the first place, adopting the ruling of the Court, discussed on page 30 of their brief, to the effect that the letter determined the liability of the parties, it inevitably follows that the Court did not regard the previous conversation as material or relevant to the matter in hand. The Court, apparently, reached its own interpretation by a process of reasoning based upon the terms of the writing alone and similar to that adopted by counsel as set forth at pp. 18–24 of their brief, and which will receive, hereafter, proper attention. In the next place, for the sake of the argument, let us suppose, as counsel say, that " when Mr. Baker wrote " the letter he had in mind his conversation with the " witness Gray, and it was his deliberate intention that " the witness Gray, when reading the letter, should " have in mind and consider the conversation". We fail to comprehend how such a condition can avail anything in favor of the defendant in error. It would naturally follow therefrom, that the writer, having in mind such conversation and considering it, and reminding the other of it, takes pleasure in now submitting for acceptance, a specific quotation for as much as the other may require, *on* a stated number of barrels of cement, for use in a certain building; notwithstanding

the previous conversation had, relating to the subject. Thus, as suggested, such conversation becomes immaterial and irrelevant. Or, on the other hand, the phrase criticised must have been inserted simply to remind Mr. Gray that the writer, till that afternoon an utter stranger to him, was the identical person who had actually conversed with him concerning the cement, but a short time before the dictation of the letter.

We submit that either or both purposes are the only ones which can be fairly ascribed to the use of this introductory phrase; and in any event the conversation would be deemed immaterial and irrelevant.

But counsel argued strenuously, "that when a writ-" ing contained a reference to a conversation as a part of " the writing, evidence of the conversation is properly " admitted in an action involving the writing" (deft's. br. p. 14). They cite in support of this rule four cases, of which *Selig et al.* vs. *Rehfuss*, 45 Atl. 919, is the exemplar. Neither the rule, nor the cases offered in support thereof, are applicable to the one before this Court. We deny that the letter in question contains a reference to a conversation as a *part of the writing*.

In *Selig* vs. *Rehfuss*, *supra*, it appears that the letter began as follows.

"As per our conversation had with your Mr. Rehfuss " to-day, we confirm our order for ten more Pearl " Button Machines," etc.

Here plainly the parties had entered into a contract

of sale confirmatory of a particular conversation, and to conform with it. The facts of this case show that in the conversation, preceding the letter, the plaintiffs had expressed a fear lest the machines desired should prove an infringement upon a certain Cleret patent button machine. Thereupon Mr. Rehfuss, one of the defendants, told one of the plaintiffs, "You need have no fear of "that, we will guarantee that is not an infringe- "ment. We will sell you these machines and we will "guarantee them not to be an infringement of the "Cleret patent." Again, and at the same conversation, Mr. Rehfuss said, "My dear sir, we are expert "experimental machinists and have been in the busi- "ness a great many years. We know just exactly "what we are talking about; and we will guarantee "that this is not an infringement of the Cleret patent. "If ever these people bother you, send them to us and "we will fight them in the courts." The plaintiffs were sued for damages by the *Cleret* people on the ground of an infringement, and the case reported in *45 Atl., at 919*, was a subsequent action brought by *Selig et al.* to recover from Rehfuss et al. the amount of damages based upon an express warranty, *collateral* to the agreement of sale.

In its opinion in the case of *Selig* vs. *Rehfuss*, the Court said in its charge:

> "The writing is undoubtedly an order for the ten extra machines, and the mere fact that the

> warranty is not written in the paper is not conclusive against the plaintiffs. The *law of Pennsylvania* does allow a collateral oral contract to be proved in the manner in which this has been attempted to be proved by the plaintiffs, so that you are at liberty to find notwithstanding the fact that the warranty is not in the paper, that such warranty was made if you believe from the evidence submitted to you that it was made."

The excerpt from the Court's charge set forth on pages 14 and 15 of the brief of defendant in error must be regarded along with that portion of the charge which we have taken the pains to insert here, as well as in connection with the particular facts of that case. When viewed in this added light it is clearly distinguishable from our own case.

The warranty sought to be proved was an independent contract and collateral to the contract of sale entered into between the parties. An independent and collateral contract is distinct and separate from the main contract of sale. It does not purport to vary, or contradict it. It stands altogether on its own footing. The principal case of *Selig* vs. *Rehfuss*, as is evident from the opinion, followed a preceding case in Pennsylvania, *Holt* vs. *Pie*, 120 Pa. St. 425. The letter in the latter case reads:

> "Confirming our verbal contract of some days ago, you will please enter the following order of good, sound hemlock lumber, etc."

The Court in that case decided:

> "So far as this order and acceptance express terms, they constitute the contract between the

> parties. They fixed the amount of lumber to be furnished, the size into which it is to be cut, the kind, and the price on the cars. But the order referred to a 'verbal agreement of some days ago' and professes to be in confirmation of it. It does not profess to cite that agreement, or be a substitute for it, but to confirm, or conform to it. The offer to prove what that verbal contract was as to any omitted terms or stipulations was not, therefore, an effort to change the terms of a written agreement but to show the whole agreement of which the letters were but part. * * *

The reason underlying the Pennsylvania decision is found declared in the case of *Schwab* vs. *Ginkinger*, 181 Pa. St. 8, in which the Court held that

> "Where a contract in writing shows *upon its face that it is not the whole contract between the parties, and does not purport to be a complete agreement*, parol evidence is admissible to show what was the whole contract and the same then becomes all parol."

Anderson et al. vs. *National Surety Company*, 46 Atl. 306, also a Pennsylvania case, is like the foregoing in all respects.

Ruggles vs. *Swanwick*, 6 Minn. 365, was an action brought to recover on a promissory note. The defendant interposed the defense of non-delivery and want of consideration. The Court held:

> "It may always be shown in defense of an action on a note in the hands of the original parties, that it was never perfected by delivery, or that there was no consideration moving between the parties to support it. * * * The verbal testimony in no way varies, or contradicts the writings. It sim-

ply furnishes the whole of the transaction of which the writings form a part and are dependent upon for their meaning and just application. It shows these pretended notes *referred to in the writings, never had either consideration or delivery to support them as claims against the defendant, etc.*"

Durham vs. *Gill*, 48 Ill. 154, involves the question of agency growing out of a writing ambiguous and unintelligible but for the parol testimony introduced. The Court there said:

> "All that we hold is, that the letter in order to be intelligible at all, and in order to determine what Durham meant by it, and how it should have been understood by Gill, must be read and interpreted in the light of what had already occurred. Read by itself, it is incomplete and enigmatical. Durham says, 'The figure we spoke of, 72 and 75, would be satisfactory to me'. This would be unmeaning, if the previous conversations between the parties did not disclose the fact that they had constantly spoken of two offers to be obtained * * * There is no analogy between this and an attempt to explain a written contract by parol evidence. An agent may derive his power in part from letters and in part from verbal instructions, and when a hastily written letter refers to former conversasations and is *obscure* except for the light thrown upon it in such conversations upon the same subject, *and the question is as to the extent of the agent's authority under it*, it is indispensable that the jury, in order to accurately judge of the latter, should know of the extent of the authority previously conferred and its limitations."

No such confirmatory reference and no such questions as those considered in the foregoing cases can be found involved in the writing, dated September 24th,

1897. It is no term or condition of the present contract that the sale is made *as per* a conversation or *in confirmation* of it. There is no pretense on the part of opposing counsel that there existed a collateral and distinct contract of warranty assumed by the plaintiff in error. There is no argument advanced based on any non-delivery or want of consideration. To hold that every writing, no matter how plain and unambiguous, or what its subject may be, beginning "referring to the conversation" would open the door to the introduction of parol testimony, irrespective of the rest of the writing, is a dangerous doctrine which this Court will not approve, nor establish. Concerning a similar question, a sister tribunal in the case of *Godkin* vs. *Monahan*, reported in 83 Fed. 116, at page 119, declares:

> "We recognize the rule that parol evidence may be received of the existence of an *independent* oral agreement not inconsistent with the stipulation of the written contract in respect to which the writing does not speak, but not to vary, qualify or contradict, add to or subtract from the absolute terms of the written contract. The collateral agreement which may be proved by parol evidence must relate to a subject distinct from that to which the written contract applies. We believe these principles to be fully in accord with the rulings of the ultimate tribunal." (Here follow 15 citations from U. S. Supreme Court.)

Again at page 120 of the same decision, the Court speaks, referring to *The Poconoket case*, 70 Fed. 640:

> "The lower Court admitted the evidence upon the rulings of the Supreme Court of Pennsylvania, *which Court has gone to an extreme in the admis-*

sion of evidence to vary written agreements. The Court of Appeals approved the decree upon the strength of those decisions and of certain other cases cited, notably certain English cases, which are reviewed and disapproved in *Naumberg* vs. *Young*, *supra*. The law of a contract at the time it is made inheres in and becomes a term of the contract, and, it is settled, cannot be changed by subsequent legislation. Still less, as it seems to us, can the law of the contract be changed by parol negotiations incident to the writing. Such a verbal agreement does not relate to a *collateral* subject, to one distinct from that to which the contract applies, but to that which inheres in, and under the law, is a term of the contract, and part and parcel of it."

See *Jones on Evidence*, Secs. 444–5.

Another instructive case on this point is *N. W. Fuel Co.* vs. *Bruns*, 1 N. Dak. 137; s. c. 45 N. W. 699. The syllabus states:

"Defendant having written plaintiff asking if it could furnish defendant coal at same prices and terms as previous season, if he used about one-half or two-thirds of amount used the previous season, and plaintiff having, by letter, in answer to this inquiry, offered to sell at the price of $3.50 per ton, and defendant having thereafter, by letter, accepted the offer, *held*, that parol evidence to show that, intermediate plaintiff's offer and defendant's acceptance, the parties fixed the amount of coal to be delivered at the full amount used by defendant the season before, instead of one-half to two-thirds, as stated in defendant's letter, was inadmissible, because it varied the terms of the written contract."

The opinion of the Court, per Corliss, C. J. decided:

"The parties, therefore, stood in the position of

having drawn, but not signed, a proposed agreement, when the conversation as to the amount of the coal to be furnished was had. This conversation was at variance with the terms of this written but unsigned proposed agreement, and it was the duty of the defendant to see to it that this parol change was interpolated into the contract before finally assenting to it. This he did not do. He signed it as it was, by writing the letter of acceptance. This accepted an offer to furnish coal at a certain price, which offer was made on condition that the amount was to be about one-half to two thirds of the amount supplied defendant by plaintiff the season before. It did not accept an offer to furnish 951 tons of coal, nor was the contract silent as to the amount. If, after submission of a written agreement for approval the parties agree to change any of the terms of the writing, the change must be made in the writing, or it will be held to embrace the true agreement of the parties. In attempts to mete out justice in individual cases, so many distinctions have been made, in order to escape the force of the doctrine excluding all oral stipulations not embraced in a written contract, that the proper application of the rule has become a problem so difficult of solution that the value of the rule has been seriously impaired. The uncertainty which has resulted has given rise to much litigation in which each party has been sanguine of success because precedents to support each theory could be found. This is to be deplored, and it is wise that this Court should at the outset uphold this principle in its full integrity."

In re Howard, 100 Fed. 630;
South Boston I. W. vs. *U. S.*, 34 Ct. Cl. 174;
Shickle vs. *Chouteau Co.*, 10 Mo. App. 242;
Bass D. G. Co. vs. *Granite City Co.*, 39 S. E. 471;
Bullock vs. *Com. Lumber Co.*, 31 Pac. 367;

Carey vs. *Gunnison*, 65 Ia. 702;
Hand vs. *Miller*, 68 N. Y. S. 531;
Cook vs. *First Nat. Bank*, 90 Mich. 214.

We have heretofore addressed ourselves to a question of practice and rulings arising on the admission or exclusion of testimony. We have done so chiefly because we deem it our duty to regard separately each argument of defendant in error. We now propose to review its stand as to the true meaning of the contract obtained from the writing alone.

In their analysis of the letter counsel start with error. They apparently discover the essence of the engagement of William Wolff & Co., in that provision of the letter which is merely introductory to the determining words and controlling portions. They assert that the statement, "We take pleasure in submitting to " you our quotation on Alsen's German Portland Ce- " ment for use in the new Wells, Fargo Building, now " in course of construction" necessarily embraces— " not any part or portion of the building but the *entire* " building". In this they are plainly mistaken. The word *entire* does not appear in the original writing. They must interpolate it or an equivalent to reach the result contended for. As the sentence stands it covers any definite quantity of cement, just as pointedly as it covers cement *for the entire building*; for the cement would be actually for use in the new building, whether the amount engaged to be furnished by William Wolff & Co., turned out to be only sufficient for a part of the

structure, or for the whole of it.

This method of inserting new terms into the writing and of excising others therefrom, as well as the obnoxious course of excising words from one part and inserting them into another portion of the writing, gives to it a strained and forced construction, instead of the plain and natural one to which it is clearly entitled. The insufficiency of the reasoning as well as the fallacy of the method become obvious immediately if we subject similar language found in the writing of the *Budge case* to such an operation as defendant in error attempted on page 20 of its brief.

Applying by the same process, to the *Budge case*, the language of Mr. Justice Bradley in the *Brawley case*:

> "The contract was not for the delivery of any particular lot, or any particular quantity, but to deliver all mining timbers required and used by the party of the second part on the Broadwater mines lease at Neihart, County of Cascade, and State of Montana, during the year A. D. 1898, about 600 mining timbers and about 15,000 lagging.
>
> "These are the determinative words of the contract and the quantity designated, about 600 mining timbers and about 15,000 lagging, is to be regarded merely as an estimate of what the parties, making the contract at the time, supposed might be required. The substantial engagement was to furnish such an amount of mining timbers and such an amount of lagging as should be required by the party of the second part for use on the Broadwater Mines Lease at Neihart, County of Cascade, and State of Montana, during the year A. D. 1898."

Such words, therefore, as opposing counsel here deem to be the controlling and determining words of the contract are found used in the writing considered in the *Budge case*. If anything, the language employed in the writing of the latter case is stronger, for it reads: "*all* mining timbers required and used by the party of the second part," etc. Yet, the Court certainly did decide that a writing may contain *other* terms which in themselves would be determining words of the contract, so as to declare the true engagement of the respective parties. It follows, as a matter of course, that the mere use of such words as are emphasized by counsel does not in every instance define the obligation undertaken. In the *Budge case* the Court said:

> "The determining words of the contract are the quantities of timber which are specified in the defendant's promise to pay and not the words 'all mining timbers required and used' contained in the plaintiff's covenants. The contract was not one in which the quantity of material to be delivered rested wholly in the will of him who was to receive it, nor was it one of those in which the contracting parties had in mind the construction of a particular work and the supply of the necessary material therefor, the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated."

The *Budge case* then, is an authority to the point that parties may mention a particular work in the writing, and yet it would not necessarily follow that such an expression would show conclusively that the parties had in mind the construction of a particular work and

the supply of the necessary material therefor, the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated. In certain instances such an expression may be governed and controlled by other terms of the writing. Each particular case, it seems, must be decided in the light of the specific writing to be reviewed, applying the rules of law enunciated in the authorities.

Counsel for defendant in error say:

"It is clear, we submit, that the contract in the case " at bar falls within this third general rule" [of the *Brawley case*] (deft's br. p. 20).

In support of the construction given to the letter by the Court below, manifestly under the application of this third rule quoted, they then cite several cases. *Thurber* vs. *Ryan*, 12 Kan. 453, refers to a writing containing determining words of undoubted meaning, altogether absent from the case here; furthermore, it fails to show, as in this case, a supplemental limitation within whose extent the acceptor would have the sole right, freely to name the amount desired. This becomes straightway clear upon examination of the contract set forth and discussed in the Kansas decision (see pp. 457–8).

Pembroke I. Co. vs. *Parsons*, 5 Gray 589, is not in point, as it comes exclusively under the first rule of the *Brawley case*. The same may be said of *Navasso Guano Co.* vs. *Commercial G. Co.*, 93 Ga. 92; *Day Adm.* vs.

Cross, 59 Tex. 595; *Watts* vs. *Camors*, 115 U. S. 353, and *Havemeyer* vs. *Cunningham*, 35 Barb. 515.

In *Callmeyer et al.* vs. *The Mayor*, 83 N. Y. 116, the written agreement stated a distinct provision that the

> "Period of the contract was for six months, and the material must be delivered as called for by the requisitions of the treasurer." * * *

It was further stipulated

> "That the material shall be furnished 'according to the *specifications* and the *requirements* of the treasurer under them; and that payment shall be made on the certificate of the engineer that the quantities have been delivered as per requisition and in accordance with specification'."

In *Harrington* vs. *The Mayor*, 10 Hun. 248,

> "By the contract, the plaintiff was to furnish 'all the sand and broken stone, of the quality and quantity, in the manner and under the conditions specified'. * * * It was also provided that if the plaintiff failed to deliver, the defendant should have the power to purchase such quantity of material as might be necessary to fulfill the contract, or such part as the engineer might deem necessary. * * * The defendant extended it [the contract], and the plaintiff acquiesced."

In *Hackett* vs. *State*, 103 Cal. 144,—the notice to contractors under which plaintiff's bid was received read:

> "The whole of the material to be furnished and work to be done as required by the *plans and specifications*, to which special reference is hereby made."

The contract provided:

> "That the party of the second part hereby cove-

> nants and agrees with the party of the first part to furnish the labor and materials, and do the following work, to-wit:—*The construction of section five of the seawall and thoroughfare and wharf* along the water-front line of the City and County of San Francisco, State of California."

The specifications stated:

> "The work to be done under these specifications consists in *furnishing all materials* and *erecting* a *stone* embankment, an *earth* embankment, and a *wharf*."

In *Tancred, Arrol & Co.* vs. *Steel Co. etc.*, 15 App. Cas. 125, the determining words of the agreement, "to "supply the whole of the steel required by you," plainly state an engagement under which the receivers of the material were bound to take from the suppliers named, all the steel required in the construction of a certain work. Without regard to previous conversations, the Court declared that the express language of the writing itself, plainly entitled the Steel Co. to furnish all the steel required in the contemplated and designated work; and consequently held Tancred, Arrol & Company to the payment of damages in favor of the Steel Company.

The question here is, Does the writing in question, *taken by itself*, state an engagement which would have compelled Wells, Fargo & Co., to receive from Wm. Wolff & Co., *all* of the cement required in the construction of its new building, in case the price of cement had fallen? And that, too, even if Wells, Fargo & Co. had, in good faith, changed the plans and specifications of

the structure, thereby increasing its height or width, or enlarging it in other respects, so as to use fourfold or tenfold the amount specifically enumerated. For the letter, to have the meaning for which opposite counsel contend, this much must be allowed; otherwise there would be entirely lacking a reciprocity of obligation on the part of Wells, Fargo & Company. With all deference, we submit, that the writing now considered, of itself, did not impose any such burden upon the defendant in error, and that its terms and conditions could not have entitled the suppliers of this brand of cement to furnish the whole of the special material required in the construction of the new building, whether erected as originally contemplated or, in good faith, altered to suit the necessities of a rapidly growing business. It will be remembered that no plans or specifications were ever exhibited or brought to the notice of any one connected with Wm. Wolff & Co.

Upon the oral argument, counsel apologizing for transgressing the record, suggested to this Court, that at the trial they stood ready to show that the defendant in error would have purchased (?) additional cement, if prices had fallen, but that the Judge below, upon objection, ruled against the admission of any such testimony. Obviously, such hidden and self-serving mental operations have no place in evidence. Without further comment in that direction, we simply quote from a recent opinion rendered by Chief Justice Parker in the Court

of last resort for the State of New York:

> " In the first place, the question did not call for a fact, but instead for a mere operation of the witness' mind, the secret, undisclosed intent of the witness in the event of the presentation of a situation calling for action * * * it sought merely to elicit from him his secret mental operation, which was safely beyond contradiction—such evidence is not admissible."
> *Saxe* vs. *Penokee L. Co.*, 159 N. Y. 371, 380.

We have thus carefully examined and reviewed the several authorities offered by defendant in error to sustain the construction given to the letter by the Court below. They fail to achieve the purpose intended, and leave this Court to apply the second general rule of the *Brawley case* and the authorities invoked on behalf of plaintiff in error, to the letter in hand.

We have been charged with entirely ignoring the expression, " for use in the new Wells, Fargo Building " now in course of construction," in the first paragraph of the letter, and "for what you may require", in the second paragraph (deft's. br. p. 18). A reference to our opening brief fails to sustain the assertion; and, besides, makes it strikingly clear that by our interpretation some force and effect is given to every word in the writing without any interpolation or elimination, or any transposition of terms from their original and natural place to convey a desired meaning.

The interpretation offered by plaintiff in error stands as the *one* true construction; for it is not at variance

with the collocation of the words used, nor with the natural arrangement of the respective parts of the letter, and gives, furthermore, each and every word purposefully employed its own common sense and well settled legal meaning. Construed from this practical point of view, the introductory part of the letter tends simply to identify the writer by reference to an incidental circumstance, not to be deemed an essential term or condition of the engagement, embraced in the quotation which followed in the second paragraph, or stating provision of the writing.

The stating part alone contains language of contract; and, therefore, it is, naturally, to be expected that it would set out the determining words of the agreement.

These, we respectfully submit, granted Wells, Fargo & Co. the right freely to name the quantity within the limitation expressly and carefully mentioned. Some meaning must be attached to the supplemental language, "*on* about 5000 barrels (5000) " more or less," without doing violence to the writing taken as a whole. No effect will be given it at all, unless it be considered in connection with the phrase immediately preceding, "for what you may require". And when so regarded, it unquestionably qualifies a general and sweeping right; which, otherwise, would have placed the one party entirely within the power of the other. So long as the limiting term "on" was intentionally inserted in the position where the completed letter left it, this Court, we submit, will not hold that

"*on* about five thousand barrels, etc.", is merely an estimate of what the parties supposed would be needed, without bearing upon the engagement undertaken by the suppliers. We think the writing readily and fairly comes under the second general rule of the *Brawley case*, and described an obligation on the part of Wm. Wolff & Company to maintain, as it states, a fixed price for the cement *on* about five thousand barrels. Upon fulfilling the demands of Wells, Fargo & Co., for deliveries up to the *specified* amount, both parties then occupied an equal position to enter into new and further engagements respecting the article indicated.

For the foregoing reasons, we respectfully pray a reversal of the judgment.

VOGELSANG & BROWN,
Attorneys for Plaintiff in Error.

No. 698.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,

Plaintiff in Error,

v.

WELLS, FARGO & COMPANY (A CORPORATION),

Defendant in Error.

Brief for Defendant in Error.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Defendant in Error.

Filed October 26th, 1901.

Clerk.

IN THE

United States Circuit Court of Appeals.

FOR THE

NINTH CIRCUIT.

WILLIAM WOLFF,
Plaintiff in Error,

v.

WELLS, FARGO AND COMPANY, A CORPORATION,
Defendant in Error.

No. 698.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

This was an action brought by the defendant in error in the United States Circuit Court, Ninth Circuit and Northern District of California, to recover from the plaintiff in error the sum of $2,876. damages for a breach of contract. The action was tried by the Court without a jury; the parties having signed and filed a written stipulation waiving a jury (Tr., p. 19). Defendant in error

had judgment for the full amount claimed, less the sum of $2,265.60 counterclaimed by the plaintiff in error; that is to say, the defendant in error had judgment for the sum of $610.40. Special findings of fact, covering all the issues in the case, were signed and filed. Briefly stated, the Court found that on or about September 24th, 1897, the plaintiff in error contracted to sell to the defendant in error as much Alsen's German Portland cement, at the rate of $2.56 per barrel, as the defendant in error should require for use in the construction of a building which it was then about to erect; that the plaintiff in error delivered 5,000 barrels of the cement, and no more; that the defendant in error required and was compelled to use 7,925 barrels of cement in the construction of the building, and was obliged to purchase the additional 2,925 barrels, over and above the 5,000 barrels furnished by the plaintiff in error, at an increased price (the price of cement having risen), to its damage in the sum of $2,876. The Court also found that of the 5,000 barrels delivered by the plaintiff in error 885 had not been paid for, and that the plaintiff in error was, therefore, entitled to an offset on its counterclaim in the sum of $2,265.60. Defendant in error accordingly had judgment for the sum of $610.40, and for its costs.

I.

ARGUMENT.

At the outset, we submit, that the only questions which will be considered on this appeal are, first, whether the

special findings support the judgment, and, second, whether or not the trial Court erred in the admission or rejection of any evidence. It is a well settled rule in the federal appellate tribunals, that **when a case is tried by the Court below without a jury pursuant to a stipulation of the parties, the facts found by the trial Court are not open to review, and, if there are special findings of fact, the appellate Court will consider only whether the facts found support the judgment.**

In **Walker v. Miller,** 59 Fed. 869, 870, the Court said:

> "Neither the Supreme Court nor the Court of Appeals will undertake to determine, in a case like the one at bar, whether the special findings are supported by the testimony contained in the bill of exceptions, for to do so would be simply to review the decision of the trial Court on questions of fact, rather than of law. By filing a written stipulation waiving a jury, the parties to the litigation may impose upon the Circuit Court the duty of making a general or special finding on questions of fact, but they cannot impose upon an Appellate Court a like duty; the finding of the trial Court, whether it be general or special, has the same conclusive effect when the case is removed by writ of error to an appellate tribunal as a similar finding by a jury. * * * These several propositions are well established by repeated adjudications."

See also:

Rev. Stat. U. S., §700;
Zeckendorf v. Johnson, 123 U. S. 617, 618;
Stanley v. Supervisors, 121 U. S. 535, 549;
Martinton v. Fairbanks, 112 U. S. 670;
Tyng v. Grinnell, 92 U. S. 467;

Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co., 106 Fed. 798;

Grattan, Tr. v. Chilton, 97 Fed. 145, 150;

Hoge v. Magnes, 85 Fed. 355, 358;

Smiley v. Barker, 83 Fed. 684, 688;

Hardman v. Montana Un. Ry. Co., 83 Fed. 88;

Jones v. McCormick Harvesting Mach. Co., 82 Fed. 295, 296;

Randle v. Barnard, 81 Fed. 682;

White v. Thacker, 78 Fed. 862;

O'Hara v. Mobile & O. R. Co., 76 Fed. 718;

Blanchard v. Commercial B'k, 75 Fed. 249, 252;

Bowden v. Burnham, 59 Fed. 752;

Farwell v. Sturges, 56 Fed. 782.

Counsel for the plaintiff in error in their brief have recited parts of the evidence; much more, we think, than is necessary for a review of the only questions that can be considered on this appeal, and not nearly enough to fully present the case if the findings of fact were to be reviewed. The evidence, oral and documentary, is contained in pages 28 to 63 of the Transcript, while in the brief of the counsel for plaintiff in error it is stated in three and a half pages.

It is clear, from the brief of the counsel for the plaintiff in error, that it is their object to obtain a review by the Appellate Court of the special finding of the Court below, that the plaintiff in error contracted to sell to the defendant in error as much Alsen's German Portland cement as the defendant in error should require for use in the constuction of the building which it was about to erect. **(Findings of Fact I, Tr.** p. 64.) In seeking a re-

view of this finding, counsel for plaintiff in error assume that it is based on the letter of September 24th, 1897, alone; the remaining thirty-five or thirty-six pages of evidence, oral and documentary, are entirely passed over. Four witnesses testified on behalf of the plaintiff in error, and four on behalf of the defendant in error; not a line of their testimony is cited. But, even if the letter of September 24th, 1897, were the only evidence in support of the finding with reference to the contract, that fact would not lessen the effect of the rule that the Appellate Court will not review the evidence.

In **Lehnen v. Dickson,** 148 U. S. 71, the Supreme Court of the United States said, at p. 77:

> "But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this Court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another, because of the difficulty in such determination. **The duty of finding the facts is placed upon the trial Court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts.**"

In **Insurance Co. v. International Trust Co.,** 71 Fed. 88, the Circuit Court of Appeals for the Eighth Circuit said, at p. 90:

> "We think, therefore, that **the conclusive effect**

> **of a special finding of fact cannot be made to depend upon the character of the proof upon which it rests.** If such a finding is regarded as conclusive, and not subject to review, when it rests on oral testimony, it must be regarded as equally conclusive when it rests on written evidence * * *."

Had the plaintiff in error desired to raise the question of the sufficiency, or insufficiency, of the letter of September 24th, 1897, to constitute a contract for only 5,000 barrels of cement, he should not have waived a jury; he could then have called upon the Court for instructions with reference to this letter, and, upon the refusal of the Court to give the instructions, could have raised the question of law which is presented in his brief with reference to the letter.

See **Dirst v. Morris,** 14 Wall. 484, 491.

Coming now to a consideration of the questions which will be determined upon this appeal, we may preliminarily remark that no question is raised as to the sufficiency of the special findings of fact to support the judgment. It is true that, in the eleventh specification of the errors relied upon in their brief, counsel for the plaintiff in error state that the "Court erred in its conclusion of law that the plaintiff was entitled to judgment against the defendant for the sum of $2,876.00, less the sum of $2,265.60—that is to say, the plaintiff was entitled to judgment against the defendant in the sum of $610.40, and for its costs." **(Brief of Plaintiff in Error,** pp. 8 and 9). But no argument is made, nor are any reasons stated, why the Court erred in this particular; nor, do we think, that this assignment is equivalent to a statement that

the special findings do not support the judgment. Be that as it may, however, we are content to submit, without further argument, the question whether the judgment is supported by the special findings. This brings us to a consideration of the errors claimed to have been committed by the trial court in the admission and rejection of testimony.

II.

The first point in the brief on behalf of plaintiff in error relates to specification of errors 1, 2, and 3. It is claimed that the Court erred in permitting the witness George E. Gray to answer the question: "State what your conversation was with Mr. Baker." Also, that the Court erred in permitting the same witness to answer the following question: "Before offering that, Colonel Gray, I will ask you what, if anything, you told Mr. Baker, preliminarily you contemplated doing with reference to a building, and why you were getting these bids?" Also, that the Court erred in denying the motion of the plaintiff in error, made after the introduction of "Plaintiff's Exhibit No. 1," to strike out, upon certain specified grounds, the conversation between the witness, George E. Gray, and Edmund Baker, prior to the said letter. For sake of convenient reference we will insert the letter of September 24th, 1897, "Exhibit No. 1." It is as follows:

"ALSEN'S PORTLAND CEMENT WAREHOUSE,
Manufacturers of Portland Cement. William Wolff
& Co., California Agent, 329 Market
Street, San Francisco.

San Francisco, California, September 24, 1897.

Colonel Geo. E. Gray,
1st Vice-President Wells, Fargo & Co., City.

Dear Sir: Referring to the conversation the writer had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use in the new Wells, Fargo building now in course of construction.

We will name you a price for what you may require, on about five thousand barrels (5,000) more or less, of two dollars and fifty-six cents ($2.56) per barrel, delivered at the building site, Second and Mission Sts., in quantities to be designated by you.

We will guarantee the Alsen Cement to be of standard quality and subject to any reasonable tests you may call for.

Very respectfully,

(Signed) WILLIAM WOLFF & CO.,
Per Edmund Baker."

It is first claimed that the Court erred in the last-mentioned particulars, because the conversations admitted "modify and change the plain and unambiguous agreement between the parties." It is then contended and assumed that the letter of September 24, 1897, constituted the contract between the parties to the exclusion of all else. This contention ignores all the other evidence. But it is immaterial at this time, and for the discussion of this point, what constituted the contract. The question is, did the Court err in admitting the evidence of the witness Gray, and did it err in refusing to strike it out? It is contended that the interpretation of written instruments belongs to the Court, and that parol evi-

dence cannot be admitted to alter or modify the plain language of a contract. These are propositions that cannot be and are not disputed. It is said that the letter of September 24th, 1897, is plain and unambiguous; still, it is noteworthy that ten and a half pages of the brief of plaintiff in error are devoted to its explanation (pp. 13 to 23.) It is divided into two parts, "artificially styled the introductory and the stating parts" (p. 20), and is subjected to a minute and careful analysis in order to arrive at its meaning.

We submit that the evidence objected to was properly admitted, and the motion to strike out was properly denied, for two reasons:

a. The evidence of the witness Gray did not alter, or modify, or add to, or contradict the letter of September 24th, 1897. It simply explained the letter, and it was properly admitted under the rule that **parol evidence is admissible to explain a writing by a reference to the circumstances under which it was made, including the situation of the subject of the instrument, of the parties to it, and of the matter to which it related, so that the trial judge can be placed in the position of those whose language he is to interpret.** In illustration of the rule we cite the following cases:

In **Reed v. Insurance Co.**, 95 U. S., 23, there was a policy of insurance on a vessel at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States, which contained a clause, "the risk to be suspended while vessel is at Baker's Island loading." At page 30 the Court said:

"This case, on the merits, depends solely upon the

> construction to be given to the clause in the policy before referred to namely, 'the risk to be suspended while vessel is at Baker's Island loading.' * * * Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the Court, in construing their language, from falling into mistakes and even absurdities."

In **Western Union Tel. Co. et al. v. American Bell Tel. Co.**, 105 Fed., 684, there was a dispute over a contract by which the defendant agreed to pay the plaintiffs twenty per cent of all "rentals or royalties" received from licenses for telephones in the United States. The defendant issued licenses to sundry corporations and received in addition to the annual rentals for telephones thirty-five per cent of the capital stock of these corporations. The plaintiffs claimed that this stock was "rentals or royalties" within the meaning of the contract and that they were entitled to twenty per cent of the stock and the dividends declared thereon. The Court said, at page 686:

> "The controversy turns upon the interpretation of the words 'rentals or royalties' in this provision. The defendant contended before the Master that these words had reference to the standard annual

rentals for telephones, and did not include profits derived from the exchange business. In support of this contention the defendant relied, first, upon the contract; and, second, upon evidence of the previous course of business, the negotiations and correspondence between the parties, and prior drafts of the contract. The Master, against the objection of the plaintiffs, admitted this evidence, **not to vary the terms of the contract, but to explain the sense in which the language was used.** If the contract had been limited to the above provisions in Article 1, with the words 'or rates as paid in accordance with the provisions of this contract' omitted, it might have been argued with much force that the meaning of 'rentals or royalties' is plain and admits of but one interpretation, and that it covers everything in the nature of rental or royalty which was received from any license for telephones by the Bell Company. But, reading the whole of this provision in connection with the provisions which follow, the most that the plaintiffs can fairly claim is that the case presents a contract which is capable of two interpretations. This being true it was clearly proper for the Master to admit evidence of previous negotiations and surrounding facts and circumstances relating to the subject-matter of the contract, in order to reach an interpretation of the language used in accordance with the understanding of the parties at the time the contract was entered into. That such evidence is admissible where a contract is capable of two interpretations and a doubt exists as to the true meaning, is well established" (Citing a large number of cases).

In **Hildebrand** v. **Fogle**, 20 Ohio, 147, the Court said, at page 157:

"These parties may be fairly presumed to have understood the matter about which they were contracting. But the same thing cannot be said of every court and jury that may be called on to interpret their contract. To enable the Court and jury to be

as wise as the parties, and so to arrive at and give application to the words they have used, and thus carry out their intentions, the law permits them to hear a full description, from evidence, of the subject-matter of the contract, and of the circumstances that surrounded the parties at the time it was made; and to learn what were the motives and inducements that led to the contract, and the object to be attained by it; or, as expressed by the Court in the case of Bellinger v. Kitts, 6 Barb., 273: 'In expounding a written instrument, the attendant and surrounding circumstance are competent evidence for the purpose of placing the Court in the same situation and giving it the same advantages for construing the instrument as are possessed by the parties who executed it.' The same rule is laid down by Mr. Greenleaf in his work on Evidence (Vol. I, Sec. 286) and enforced by a great variety of illustrations. The object or tendency of this evidence is not to contradict or vary the terms of the instrument, but to enable the Court to come to the language employed, with an enlightened understanding of the subject-matter in reference to which it has been used."

Section 1647 of the Civil Code of California is as follows:

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Section 1860 of the Code of Civil Procedure is as follows:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

See also:

Runkle v. Burnham, 153 U. S. 216, 224;

U. S. v. Peck, 102 U. S. 64;

Brawley v. U. S., 96 U. S. 168;

Bradley v. The Washington A. & G. S. P. Co., 13 Pet. 89, 99;

Peisch v. Dickson, 1 Mason 9, 11, 12;

Chicago Cheese Co. v. Fogg, 53 Fed. 72, 73;

Chicago & I. R. Co. v. Pyne, 30 Fed. 86, 88;

Citizen's B'k of Emporia v. Brigham, et al., 60 Pac. 754, 755;

Baker v. Clark, 128 Cal. 181, 186;

Balfour v. Fresno Canal & Irr. Co., 109 Cal. 221;

Saunders v. Clark, 29 Cal. 299, 304;

Weaver v. Lapsley, 42 Ala. 601, 611;

Ellis v. Burden, 1 Ala. 458, 465, 466;

Bruce v. Moon, 35 S. E. 415, 418;

Brown v. Markland, 52 Pac. 597, 598, 599;

Donlin v. Daegling, 80 Ill. 608;

Mace v. Jackson, 38 Ind. 162, 166;

Keller v. Webb, 125 Mass. 88;

Stoops v. Smith, 100 Mass. 63, 66;

Axford v. Meeks, 59 N. J Law, 502;

Field v. Munson, 47 N. Y. 221;

City of Atlanta v. Schmeltzer, 83 Ga., 609, 613.

b. The evidence was properly admitted, because the letter itself refers to the conversation. It begins: "Referring to the conversation the writer Mr. Baker had with you this afternoon." When Mr. Baker, for the plaintiff in error, wrote the letter, he had in mind, therefore, his conversation with the witness Gray, and it was his deliberate intention that the witness Gray, when reading the letter, should have in mind and consider the conversation; otherwise he would not have begun his letter with a distinct reference to the conversation. Could the trial

Court have given the letter a proper construction without evidence of the conversation which the parties had in mind? When the Court admitted evidence of the conversation it merely placed itself in the position of the parties to the contract at the time that it was made. **When a writing contains a reference to a conversation as a part of the writing, evidence of the conversation is properly admitted in an action involving the writing.**

This rule was recognized in the recent case of

Selig et al. v. Rehfuss et al., 45 Atl. 919.

In that case the Supreme Court of Pennsylvania went so far as to hold that, because there was in a letter, which constituted a contract, a reference to a conversation, the parties could, by the conversation, prove a warranty not contained in the writing. The letter began as follows:

> "**As per our conversation had with your Mr. Rehfuss to-day**, we confirm our order for ten more pearl button machines, like the samples you made for us, thus making eleven machines in all * * *."

The Court said, at page 920:

> "On the trial, plaintiffs insisted that, by the terms of their contract, there had been an express warranty by the defendants that the machines would not infringe upon the patent, and the defense was that, as the letter of November 16, 1894, made the contract a written one, containing no warranty, parol evidence was not admissible to sustain the claim asserted * * *."
>
> "The letter of November 16, 1894, stating that 'As per conversation had with your Mr. Rehfuss to-day * * *,' the offers of the plaintiffs to prove what this conversation was were to make clear that part of the contract not embodied in the letter, and

were properly allowed by the Court. The offers were not to vary the terms of a contract fully and clearly set forth in a writing, nor to incorporate that which had been omitted by fraud, accident, or mistake, but simply to prove the whole contract, of which the letter was evidence of only a part. The learned trial judge, correctly entertaining this view of the letter, properly said to the jury: 'On the 16th of November, you remember, the order was given in writing, **but the writing referred to a conversation, and it is only for that reason that it is for the jury to interpret the whole affair. The writing itself referring to a conversation, I am bound to let the conversation go before you for your judgment, and, when that goes before you for your judgment, you must take it in connection with the writing, and judge them together.'**"

In **Anderson et al. v. National Surety Co.**, 46 Atl., 306, it was **held** that, when a letter which the defendant claimed constituted the contract, began as follows: "As per our conversation of yesterday," parol evidence of the conversation was properly admitted.

See, also:

Ruggles v. Swanwick, 6 Minn. 365, 371;
Durham v. Gill, 48 Ill. 151, 154, 156.

III.

While the subject of the first point of the brief of counsel for plaintiff in error, according to its heading, is the alleged error of the Court in the admission of certain evidence, still the greater part of this point is devoted to a discussion of the letter of September 24th, 1897, under the heading, "Construction of the Writing." We think

the Court will not close its eyes to the fact that this is merely an attempt to obtain a review of the special finding of the trial Court that the plaintiff in error contracted to sell to the defendant in error all the cement it should require for use in the construction of its building. While we contend that this special finding is conclusive upon the Appellate Court, and that the letter of September 24th, 1897, as evidence in support of this finding, is not open to discussion on this appeal any more than would be any other evidence, still, in view of the fact that the Court may determine to pass upon the legal effect of the letter of September 24, 1897, we desire to show that, even if the finding had been based on the letter alone, it was correct.

First, however, we deem it our duty to point out that in discussing this letter counsel for plaintiff in error have not adhered to the evidence furnished by the letter alone. They say that

> "the meaning, as plain as language can make it, is that the writer offers to fix a price on **an article produced abroad.** * * * **Mr. Gray had instructed Mr. Baker to reduce his proposition to writing.** * * This, Mr. Baker did in the matter set out: **but only after he had returned to the office of Wm. Wolff & Co.,** where, it is fair to assume, must have been kept all the information and necessary data concerning the stores of 'Alsen's German Portland Cement' on hand, the lots to arrive, and the true condition of the present and prospective supplies in Europe. **The record makes it manifest that Mr. Baker dictated the letter at the office of Wm. Wolff & Co.," (Brief,** p. 17);

And again, on pages 20 and 21:

> "And upon the complete delivery of the full num-

> ber of barrels expressed, both parties would occupy an equal position, to enter into new and further engagements respecting the price of an article produced only abroad and arriving at San Francisco irregularly in sailing vessels, and in uncertain quantities."

We must ask the Court, in reviewing this letter, if it intends to do so, to eliminate from its consideration all these statements. These very digressions by counsel into the record at large show that counsel are but transgressing a rule founded upon wisdom and justice when they ask this Court to pass upon the special finding of fact claimed to be based upon the letter of September 24th. If, to construe this letter, the Court is asked to pass upon evidence, other than that furnished by the letter itself, it should review all the evidence in the record. This it will not do. Of course, the argument, on page 21 of counsel's brief, that fifty or one hundred thousand barrels of cement might just as well have been demanded, is of no force. There is not even a suggestion, in the entire record, of bad faith on the part of the defendant in error, or that there were any changes in the plans of its building.

With these preliminary remarks, we pass to a consideration of the letter. Without attempting to cover the ground gone over by counsel in their self-styled "artificial," and, we may add, microscopic, analysis of the writing, we call the attention of the Court to the plain and evident purpose of the letter, as expressed upon its face. The writer says:

> "We take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use

in the new Wells, Fargo Building now in course of construction."

In the first place, here was a quotation on cement for use in the new Wells, Fargo Building—not any part or portion of the buiding, but the entire building. Then follows this language:

> "We will name you a price for what you may require, on about five thousand barrels (5,000), more or less, of two dollars and fifty-six cents ($2.56) per barrel, delivered at the building site, Second and Mission Sts., in quantities to be designated by you."

Were one to entirely eliminate the words in the first paragraph of the letter, "for use in the new Wells, Fargo Building now in course of construction," and those in the second paragraph, "for what you may require," then the construction of this writing given to it by counsel for plaintiff in error would be correct. In their discussion of the writing they entirely ignore the expressions "for use in the new Wells, Fargo Building" and "for what you may require." We contend that here was a clear and distinct undertaking to furnish for use in the new Wells, Fargo Building, then in course of construction, as much cement as should be required. In support of this contention we cite first the leading case upon this subject:

Brawley v. United States, 96 U. S. 168.

That case is very similar to the case at bar. This Court is thoroughly familiar with the Brawley case, having had occasion to consider it in the recent case of Budge v. United Smelting and Refining Co., 104 Fed., 198. The Budge case was decided October 1, 1900, a few weeks

prior to the trial of the case at bar, and the learned Judge of the Court below in the case at bar was one of the Judges who participated in the decision in the Budge case.

In **Brawley v. United States,** Brawley executed a contract by which he agreed to sell "eight hundred and eighty (880) cords of * * * oak wood, more or less, as shall be determined to be necessary, by the post commander, for the regular supply, in accordance with army regulations, of the troops and employees, * * * for the fiscal year ending June 30th, 1872." Forty cords of the wood only were received and accepted by the post commander, and Brawley filed a petition in the Court of Claims to recover for the remaining eight hundred and forty cords. The Court of Claims dismissed the petition and Brawley appealed to the Supreme Court of the United States. In delivering the opinion of the Court, Mr. Justice Bradley said:

> "The contract was not for the delivery of any particular lot or for any particular quantity, but to deliver at the post of Fort Pembina eight hundred and eighty cords of wood, 'more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 1st, 1871.' These are the determinative words of the contract, and the quantity designated, 880 cords, is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post commander for the regular supply for the year, in accordance with army regulations."

Mr. Justice Bradley laid down three general rules as applicable to cases of this kind, the third of which is as follows:

> "If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions, as, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variations from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith."

It is clear, we submit, that the contract in the case at bar falls within this third general rule, and that the principles which determined the **Brawley** case are determinative of the case at bar. "Five thousand barrels" was a mere estimate. The determinative words of the contract were to sell as much cement for use in the new Wells, Fargo Building as **should be required.**

Applying the language of Mr. Justice Bradley, in the **Brawley** case, to the case at bar:

> "the contract was not for the delivery of any particular lot, or any particular quantity, but to deliver for use in the new Wells, Fargo Building now in course of construction five thousand barrels, more or less, as you may require.
>
> "These are the determinative words of the contract and the quantity designated, five thousand barrels, is to be regarded merely as an estimate of what the parties making the contract at the time supposed

might be required. The substantial engagement was to furnish such amount of cement as should be required by Wells, Fargo & Company for use in its new building."

We further submit that the decision of this Honorable Court in **Budge v. United Smelting & Refining Co.**, 104 Fed. 498, but emphasizes the correctness of this view of the contract. The contract in the **Budge** case was classed under the second general rule stated by Mr. Justice Bradley in the **Brawley** case, i. e.:

> "When no independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about', 'more or less', and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight."

In the **Budge** case this Court said:

> "The provision that the latter (the lagging or cribbing timber) should be delivered as requested 'at the tunnels mentioned' and 'in the quantities designated' by the defendant, has reference only to the **place and method of the delivery, and not to the total quantity required and used.** The defendant, upon his part, covenanted to pay the plaintiff for all mining timbers, 'about six hundred,' and for all lagging and cribbing received by him, 'about fifteen thousand.' Here is a distinct promise to receive and pay for about six thousand pieces of one kind of timber and fifteen thousand of another. * * *
>
> "The contract was not one in which the quantity of material delivered rested wholly in the will of him who was to receive it, nor was it one of those in which the **contracting parties had in mind the construction of a**

particular work, and the supply of the necessary material therefor; the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated."

The only cases cited by plaintiff in error, besides the **Budge** case, in support of their construction of the letter of September 24, 1897, are **Cabot v. Winsor et al.**, 83 Mass. 546 (1 Allen 546), and **Shickle v. Chouteau Co.**, 10 Mo. App. 242. **Cabot v. Winsor et al.**, was a contract to furnish five hundred bundles of gunny bags, "more or less". It was, in the language of the Court in **Brawley v. United States**, a case in which, there being an "engagement to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract." **Shickle v. Chouteau Co.** was a contract for the sale of 400 tons of iron "more or less". Both cases, like the **Budge** case, fall under the second general rule stated by Mr. Justice Bradley, and are, therefore, inapplicable to the case at bar.

On the other hand in support of the construction given to the letter of September 24th, 1897, by the Court below, we respectfully call the attention of the Court, in addition to **Brawley v. United States**, to the following cases:

In **Thurber v. Ryan**, 12 Kan. 453, it was held that a contract to furnish six hundred cords, more or less, of stone, sufficient for the construction of a specified building, is not a contract to deliver six hundred cords absolutely, but only so much thereof as shall be required for the construction of the building.

In **Pembroke Iron Co. v. Parsons**, 5 Gray, 589, there was

an agreement to sell "a cargo of old railroad iron, to be shipped per barque Charles William, at thirty dollars per ton, delivered on the wharf at the port of discharge, dangers of the seas excepted—about 300 to 350 tons." Only 227 tons were delivered, and this was held a sufficient compliance with the contract. Shaw, C. J., said at page 590:

> "The subject of the contract of sale and purchase was a cargo of old railroad iron, to be carried by the barque Charles William from Savannah to Boston; it was a cargo, one cargo, only. It was then limited and measured by the quantity she could carry at once. **Whether the plaintiffs knew of the capacity of that vessel or not is immaterial, because they agreed to and adopted it, as the description and measure of their purchase. The figures at the bottom, 'about 300 or 350 tons,'** are undoubtedly to be taken as a part of the contract. But, taken with the context, they **manifestly express an estimate only, and do not control the descriptive clause designating and limiting the subject of the contract.** The defendant, having delivered a full cargo, has performed his contract, and the instructions of the judge were correct."

In **Tancred, Arrol & Co. v. Steel Co. of Scotland, Ltd.,** 15 App. Cas., 125, (1890) the Steel Co. had agreed with Tancred, Arrol & Co. to supply "the whole of the steel required by you" for certain work; and in another part of the contract the quantity was estimated at "30,000 tons, more or less." Held, that the Steel Co. had a right to supply all that Tancred, Arrol & Co. required for the work, although largely in excess of 30,000 tons. In this case the position of the parties was reversed from that in the case at bar; the price of steel had fallen, and

Tancred, Arrol & Co. sought to evade their contract and purchase steel at the decreased market price.

In **Navasso Guano Co. v. Commercial Guano Co.**, 93 Ga., 92, the Supreme Court of Georgia followed the rule laid down in the Brawley case and held that where a person purchased from another a certain and designated pile of fertilizer in bulk, the same being then stored in a named warehouse, and "estimated to be 253½ tons, more or less," the purchaser was obliged to take the entire lot, although it amounted to 702.7 tons.

See also:

Callmeyer et al. v. The Mayor, 83 N. Y. 116;

Harrington v. The Mayor, 10 Hun. 248; (affirmed in 70 N. Y. 604);

Day, Adm., v. Cross, 59 Tex. 595;

Watts v. Camors, 115 U. S. 353;

Hackett v. State, 103 Cal. 144;

Havemeyer et al. v. Cunningham et al., 35 Barb. 515.

IV.

The second point in the brief of counsel for plaintiff in error deals with specification of erors 4 and 6. It is claimed that the trial court erred in rejecting testimony offered by plaintiff in error to prove his own and his agent's actions, with reference to the contract, subsequent to the time that it was made, in support of his construction of the contract. The Court sustained an objection by the defendant in error to the following question propounded to the plaintiff in error: "Did you

reserve that amount of cement for them?" And also an objection to the following question put to the witness Baker, who was the agent of the plaintiff in error: "What did you do after you were notified by Mr. Percy that they had accepted your proposal?" In support of their argument on this point, counsel here assume that the letter of September 24, 1897, was ambiguous, and that parol testimony was proper to explain it. They first cite the case of **Budge v. United Smelting & Refining Co.**, 104 Fed., 498. But we submit that the case is not in point, because no evidence was offered in that case; it was decided on a demurrer to the complaint. In **Auzerais v. Naglee**, 74 Cal., 60, 67, the next case cited, the Court merely held that an author of a letter could explain in which of two senses he used the expression "settle;" but it does not hold that actions or declarations of the author in regard to the letter are admissible as showing his construction of the letter. In **Block v. The Columbian Insurance Co.**, 42 N. Y., 393, the next case cited, the acts of an officer of the defendant in his construction of a contract was used as evidence against the defendant, not in its favor. The case needs no further comment. **Knight v. New England Worsted Co.**, 56 Mass., 271 (2 Cush., 271), the next case cited, belongs to the same class as **Block v. The Columbian Ins. Co.**; and **Chicago v. Sheldon**, 9 Wall., 50, the last case, does not decide the point to which it is cited. On the other hand, we submit that this evidence was properly excluded under the rule that: **Self-serving acts and declarations of one of the parties to a contract subsequent to its execution, are not admissible to show either what he understood the contract to mean, or what it means.**

"Sayings of one party, in the absence of the other, tending to establish his version of the contract, and which form no part of the *res gestæ*, are not admissible in his own behalf."

Williams v. English, 64 Ga., 546, 548.

In **Hill v. The John P. King Mfg. Co**, 79 Ga., 105, 109, the Court said:

"The same witness was offered to prove the meaning of the instrument, or else the plaintiff's understanding of its meaning, by what the plaintiff had written about it to the witness, or rather, perhaps, by an inference which the witness had drawn from a letter which he had received from the plaintiff. This was also excluded. A party to a contract cannot, by proving what he said or wrote to a third person after the contract was entered into, show either what it means or what he understood it to mean. Such evidence is not admissible."

"The conduct, admissions and declarations of a party in his own interest are no more competent as evidence for his estate after his death than for himself while living."

Jones on Evidence, Sec. 236.

In **Latimer v. Barrows**, 163 N. Y., 7 (57 N. E., 95), a defaulting vendor sought to show by his own acts that the vendee had suffered no damage. The Court said, at page 96:

"That the evidence objected to should have been excluded seems obvious. It was, in effect, admitting in his favor proof of the plaintiff's own act or an act to which he was an essential party. If such evidence was admissible, a party might establish the extent of a liability of another or the absence of liability on his part, by proving his acts with a third person, as to

> which the other party could produce no proof. It is clear that a party may not prove his self-serving declarations in his own behalf. Upon the same principle, we think he cannot prove his self-serving acts in his own favor."

In **Travers** v. Stewart, 64 N. Y. S. 211, 213, a broker claiming from another broker half of a commission on a sale of land was held not entitled to introduce as evidence of his claim a writing sent by him to the owners of the land in which he asserted that he claimed one-half of the commissions, and the Court said:

> "At best, it was a declaration of a party in his own favor."

So a plaintiff will not be permitted to introduce a bill of particulars served by him upon the adverse party, as evidence of his cause of action.

Seim v. Krause, 83 N. W., 583, 585.

See also:

Nicholson v. Tarpey, 70 Cal., 608, 610.

Rogers v. Schulenburg, 111 Cal., 281, 286.

V.

In their third point counsel for plaintiff in error attack the ruling of the Court in striking out the conversations that were had between the witness Baker and Mr. Percy, several months after the letter of September 24th, 1897, was written (**Specification of Errors** 5 and 7). We shall not follow counsel in their argument with respect to the evidence. We think much more ground is covered than is necessary to a discussion of the alleged error. Except

for the circumstance that Mr. Percy was the architect of the building, the evidence here sought to be introduced is of the same character as that discussed in the previous subdivision—acts and declarations, with reference to a contract, by one party to the contract, in his own favor,—and was, therefore, properly excluded. So far as Mr. Percy was concerned, while he was the architect of the building, he was not the agent of the defendant in error for the purchase of cement; and whether or not he purchased 6,000 barrels on his own account (Tr., p. 45), or one barrel, could not in any way affect the defendant in error. Nor could the defendant in error be affected by conversations that the witness Baker had with Mr. Percy regarding cement. Mr. Percy was no more the agent of the defendant in error for the purchase of the cement for its building than he was for the purchase of the property on which the building was erected. Notice to Mr. Percy respecting cement was not binding on the defendant in error, which employed him as architect and not to purchase cement.

See

Renton Holmes Co. v. Monnier, 77 Cal. 449, 453, 454;

Wittenbrock v. Parker, 102 Cal. 93, 104;

Westfield B'k v. Cornen, 37 N. Y. 320;

Tootle v. Cook, 35 Pac. 193, 195;

Pennoyer et al. v. Willis, 36 Pac. 568;

Deane v. Roaring F. E. L. & P. Co., 39 Pac. 346, 348;

Strauch v. May, 83 N. W. 156.

VI.

The fourth point in the brief on behalf of the plaintiff in error relates to the alleged error of the trial court in refusing to grant the motion of plaintiff in error for a nonsuit. In reply to the argument on this point we think it is sufficient to call to the attention of the Court that, after the motion for nonsuit was made and denied, the plaintiff in error did not rest. Under these circumstances, this Court will not review the action of the trial court in denying the motion. It is a rule in the federal courts that: **When a defendant does not rest after making a motion for a nonsuit, but introduces evidence in support of his own case, the action of the trial Court in denying the motion will not be reviewed.**

> "By not resting on his motion for a nonsuit, and by thereafter offering his own evidence, the defendant waived his motion and the overruling thereof cannot be assigned for error here."
>
> **Runkle v. Burnham**, 153 U. S. 216, 222.

See also:

Hansen v. Boyd, 161 U. S. 397, 403;

U. P. Ry. Co. v. Daniels, 152 U. S. 684;

Col. & Puget Sound Ry. Co. v. Hawthorne, 144 U. S. 202, 206;

Robertson v. Perkins, 129 U. S. 233, 236;

N. P. R. R. Co. v. Mares, 123 U. S. 710, 713;

Accident Ins. Co. v. Crandal, 120 U. S. 527;

Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 701.

VII.

Should it be determined that any error has been committed in the admission or rejection of any evidence in this case, then, we submit, it was harmless error and not ground for reversal, for the two following reasons:

a. In the first place, we have endeavored to show that, considering the letter of September 24th, 1897, alone, the plaintiff in error contracted to sell to the defendant in error as much cement as it should require for use in its building. If this position is sound, then none of the other evidence, including that admitted and rejected over the objection of the plaintiff in error, was material, and any error committed in that regard was, therefore, harmless.

b. If there was any error in admitting or rejecting evidence, it was harmless, because the Court declared that in its opinion the letter of September 24th, 1897, determined the liability of the parties. On page 54 of the Transcript, there is the following:

> "THE COURT: I do not think the testimony is relevant. The liability of these parties must be adjusted upon the contract. When that letter was written and delivered to Wells, Fargo & Co., and Mr. Baker was informed by Mr. Percy that his contract had been accepted, the terms were made and that was the end of the transaction, so far as the liability of the parties was concerned."

It appears, therefore, that the trial Court did not consider the parol testimony material or relevant.

A case tried by a Court without a jury will not be reversed because of the erroneous admission of harmless evidence:

"The admission of evidence in a case being tried by a court without the intervention of a jury does not require the nice distinction of ruling that it does when it is to go to a jury, and the fact that testimony is given in an answer or read in a deposition does not necessarily imply that it is improperly considered in the final examination and conclusion of the case. The same judicial mind that would exclude it from a jury can as readily set it aside upon a final consideration; and, where there appears sufficient evidence to justify the conclusions reached, the presumption is that the irrelevant testimony, although heard and not positively excluded by order, was set aside eventually, and not considered to the injury of the plaintiff in error."

Miller v. Houston City St. Ry Co., 55 Fed. 366, 372.

"The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent, as in this case, that it could not have affected the verdict or the finding injuriously to the plaintiff in error."

Mining Co. v. Taylor, 100 U. S. 37, 42.

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases, because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

Holmes v. Goldsmith, 147 U. S. 150, 164.

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the rulings were made."

Lancaster v. Collins, 115 U. S. 222, 227.

See also:

Runkle v. Burnham, 153 U. S. 216, 221;
Louisville & N. R. Co. v. White, 100 Fed. 239, 243;
Chapman v. Yellow Popular L. Co., 89 Fed. 993;
Moline M. I. Co. v. York I. Co., 83 Fed. 66, 71;
Sipes v. Seymour, 76 Fed. 116;
Steiner et al. v. Eppinger et al., 61 Fed. 253;
U. S. v. Shapleigh, 54 Fed. 126 137;
Reed v. Stapp, 52 Fed. 641, 645.

VIII.

In their fifth point counsel for plaintiff in error ask this Court to review the evidence in support of the special findings of fact that the plaintiff in error contracted to sell to the defendant in error as much cement as it should require for use in the construction of its building, and that the amount of cement contracted to be sold was not restricted to any particular number of barrels. In support of their request, they cite the case of National Cash-Register Co. v. Leland et al., 94 Fed., 502, 507; and in this particular they have worded their brief in the language of the decision in that case. But we submit that the language of the Court in that case is inapplicable to the case at bar, and that there is a vital distinction between the two cases. The specifications there, which were "inartificially and unskillfully drawn," relate to the judge's charge and to his refusal to give rulings which the plaintiff requested (p. 506). These are questions which are proper subjects of review. But in the

case at bar, while specifications nine and ten were not only not "inartificially and unskillfully drawn," they also relate to the special findings of fact and cannot, therefore, be considered on this appeal.

So far as the remark of counsel for the plaintiff in error, at the end of their brief, with reference to the hope of the Judge of the Court below, is concerned, we consider the remark improper and out of place; it is not in the record, nor do we remember ever having heard the Court give vent to the expression of hope here attributed to him. On the contrary, having but a few weeks previously to the time of the trial of the case at bar participated in the decision by this Court in the case of **Budge v. United Smelting & Refining Co.**, the Judge of the Court below called the attention of counsel in the case at bar, during the trial, to the **Budge** case, and, at the time of the rendition of judgment herein, he delivered an oral opinion, in which he said that, under the rules established by the case of **Brawley v. United States**, and by the **Budge** case, there was no doubt in his mind that the plaintiff in error had obligated himself by the letter of September 24th, 1897, to furnish all the cement the defendant in error should require for use in the construction of its building. Accordingly he made an order that judgment be entered for defendant in error.

In conclusion, we respectfully submit that no error of law was committed in the admission or rejection of evi-

dence in the trial of this case; that if any such error was committed it was harmless; and that, viewed from any standpoint, the judgment of the Court below should be affirmed.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Defendant in Error.

No. 698.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,
Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY
(a corporation),
Defendant in Error.

Brief on Behalf of Plaintiff in Error.

VOGELSANG & BROWN,
Attorneys for Plaintiff in Error.

Pernau Bros. Print, 543 Clay St., S. F.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF, Plaintiff in Error, vs. WELLS, FARGO & COMPANY (a corporation), Defendant in Error.	No. 698.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Facts.

Defendant in Error commenced this action to recover damages for breach of a contract of sale claimed to have been entered into by and between it and the Plaintiff in Error, at the City of San Francisco, on the 24th day of September, 1897.

The complaint alleged that under such contract the Plaintiff in Error agreed to sell to the Defendant in Error as much ALSEN'S GERMAN PORTLAND CEMENT as it should require for use in the construction of a

certain building, said cement to be furnished at the rate of $2.56 per barrel. It is alleged, further, that Defendant in Error had required and had been compelled to use 7925 barrels of said cement in the construction of said building, and that Plaintiff in Error had refused to sell and deliver any greater number than 5000 barrels, although often requested to furnish the entire amount which Defendant in Error needed for such construction, to the consequent damage of the latter in the sum of $2876.00 (Tr. pp. 6, 27).

The answer denied the contract as declared in the complaint, and in that behalf averred that the parties contracted for the price of $2.56 per barrel on 5000 barrels of said cement; and that thereupon, and before the commencement of the action, the Plaintiff in Error duly delivered said 5000 barrels at the rate of $2.56 per barrel, and in all things performed the contract on his part (Tr. pp. 10, 11).

The answer besides, by appropriate allegations, stated a counter claim against Defendant in Error for the recovery of $2265.60, the purchase price of 885 barrels of said cement at the specified rate of $2.56 per barrel, which it was conceded had been properly delivered and not paid for (Tr. pp. 13, 15, 23, 36, 58).

It appears that on September 24th, 1897, Wells, Fargo & Company, the Defendant in Error, contemplated the construction of a building in San Francisco, which was begun in that year and completed at the

very last of the year 1898. In the work of constructing this building a large quantity of cement was used (Tr. pp. 28–29, 50). Wells, Fargo & Company employed the firm of Percy & Hamilton as architects for the said building, and Mr. Percy, according to the record, was the only member of that firm who had to do with the actual work of erecting the structure (Tr. pp. 44, 52). On, and before, September 24th, 1897, Mr. William Wolff, the Plaintiff in Error, as William Wolff & Company, was engaged in the importing and commission business at San Francisco, and acted there simply as the *selling* agents and local distributors of certain building material commercially known as "Alsen's German Portland Cement". This brand of cement was not produced in the United States but made only in Germany, from which country it reached San Francisco in sailing vessels and in uncertain amounts. At times a lack of this cement existed in Europe (Tr. pp. 48, 55). It seems that on said day, Mr. Edmund Baker, representing William Wolff & Company, for the first time met Mr. George E. Gray, the gentleman who had full charge of the matter of buying cement for the building in question, and interviewed him respecting a purchase of Alsen's German Portland Cement. Both these gentlemen differ widely in their recollection of the conversation, which passed at this interview had between them, although it seems to have been but a very brief one. Neither at this conversation nor at any other time, were any plans, bids, proposals,

or specifications of any sort, relating to the work of construction, ever exhibited to Mr. Baker, or any person connected with William Wolff & Company. Immediately after such interview between Mr. Baker and Mr. Gray, the former returned to the office of William Wolff & Company and there dictated and, on the same afternoon, caused the following proposition to be delivered to Mr. Gray for Wells, Fargo & Company.

"San Francisco, California, September 24, 1897.
Colonel Geo. E. Gray,
1st Vice-President Wells, Fargo & Co., City.

Dear Sir:—Referring to the conversation the writer Mr. Baker had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use in the new Wells, Fargo Building now in course of construction.

We will name you a price for what you may require, on about five thousand barrels (5,000) more or less, of two dollars and fifty-six cents ($2.56) per barrel delivered at the building site Second and Mission Sts., in quantities to be designated by you.

We will guarantee the Alsen Cement to be of standard quality and subject to any reasonable tests you may call for.

Very respectfully,
(Signed) WILLIAM WOLFF & CO.,
Per Edmund Baker."

Wells, Fargo & Company promptly accepted this offer (Tr. pp. 28, 33, 36, 46, 52–3, 61).

The present controversy between the parties arises upon the true construction to be given the said letter. At the trial, the Plaintiff in Error claimed that he had fulfilled its terms and conditions by a delivery of 5000

barrels of said cement, at the price named; and *in any view*, at the utmost, under this contract, the Defendant in Error could not lawfully insist upon a delivery, at the price quoted, of more than 5000 barrels, plus a small percentage of said number to cover the words "more or less". The Defendant in Error, on the other hand, maintained that a true construction of the terms of the written instrument, entitled it rightfully to demand *all* the cement that it should require for use in the erection of the building indicated (Tr. pp. 48, 49, 58–9).

The case was tried by the Court, under a written stipulation waiving a jury. The Presiding Judge construed the writing in question against the contention of Plaintiff in Error, and judgment followed in favor of the Defendant in Error, for the sum of its damages, as prayed for, less the value of 885 barrels of said cement for which it had not paid. Another suit involving the same parties and the same subject matter, but in which the position of the parties stood reversed, the Plaintiff in Error here acting as plaintiff below, was brought about the same time as the case at bar. It appears to have been a mechanic's lien suit based upon the claim for the purchase price of the 885 barrels of cement heretofore described (Tr. p 37). It is unnecessary to give the latter action further mention.

The Plaintiff in Error brings error to this Court on the question of law involved in the true construction

of an unambiguous and plain writing. The various assignments of error all point to the question lying at the very threshold of the case, "What is the true construction applicable to the letter of September 24, 1897?"

Specification of Errors.

The Plaintiff in Error herewith specifies the following errors of the Court below, upon which he relies for a review of its construction of the said writing and a reversal of the judgment herein.

1. Said Court erred in overruling defendant's objection to the following question propounded to the witness, George E. Gray: "State what your conversation was with Mr. Baker" (See Tr. pp. 30, 70–1).

2. Said Court erred in overruling defendant's objection to the following question propounded to the witness, George E. Gray: "Before offering that, Colonel " Gray, I will ask you, what, if anything, you told Mr. " Baker, preliminarily, you contemplated doing with " reference to a building, and why you were getting " these bids?" (See Tr. pp. 31–2, 71).

3. Said Court erred in overruling and denying the defendant's motion made after the introduction in evidence of "Plaintiff's Exhibit No. 1" to strike out the conversation between the witness, George E. Gray, and Edmund Baker, prior to the said letter, upon the following grounds:

(a) That the said writing is clear and unambiguous and speaks for itself.

(b) All prior negotiations and conversations must be deemed merged in said writing.

(c) The parol testimony offered and in evidence modifies and changes the said writing and agreement.

(See Tr. pp. 33, 71, 72. A typographical error appears on p. 72 in substituting "the" for "and" found on p. 33, before the word "changes".)

4. Said Court erred in refusing to allow the witness, William Wolff, to answer the following question propounded to him: "Did you reserve that amount of cement for them?" (See Tr. pp. 72, 48–9).

5. Said Court erred in granting the motion of plaintiff to strike out the following answer of witness George W. Percy: "He, (Edmund Baker) told me he was going " away to be gone some weeks; that he had caused the " entire 5000 barrels, that we should require at the " Wells, Fargo building, to be stored in the warehouse " subject to our orders". (See Tr. pp. 72–3, 50–1).

6. Said Court erred in refusing to allow the witness Edmund Baker to answer the following question propounded to him: "What did you do after you were noti- " fied by Mr. Percy that they had accepted your pro- " posal?" (See Tr. pp. 73, 54, 56).

7. Said Court erred in granting the motion of counsel for plaintiff to strike out the following answer

made by the witness Edmund Baker: " I called on Mr. " Percy as I usually did before leaving town on my " Eastern trips, and in this instance to inform " him that I was holding the undelivered quantity of " 5000 barrels for Wells, Fargo & Company, and he " said very well that was all right." (See Tr. pp. 73, 56).

8. Said Court erred in refusing to make a rule holding, (a) that the contract as plead by the plaintiff is at variance with the contract proved; (b) that the evidence before the Court did not sustain the cause of action set forth in the complaint. (See Tr. pp. 72, 46–7).

9. Said Court erred in ruling, holding and finding that on or about the 24th day of September, 1897, the defendant contracted to sell to the plaintiff as much of Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building, which the plaintiff was at the time about to erect in the said City and County of San Francisco, at the rate of $2.56 per barrel. (See Tr. pp. 73–4).

10. Said Court erred in ruling, holding and finding that the amount of cement so contracted to be sold was not restricted to any particular number of barrels. (See Tr. p. 74).

11. Said Court erred in its conclusion of law that the plaintiff was entitled to judgment against the defendant for the sum of $2876.00, less the sum of $2265.60, that is to say, the plaintiff was entitled to

judgment against the defendant in the sum of $610.40 and for its costs. (See Tr. p. 77).

Argument.

I.

The Court erred in permitting the questions propounded to witness, George E. Gray for the purpose of ascertaining what he told Mr. Baker, preliminarily, he contemplated doing with reference to the building, and why he was getting the bids, and in admitting his several answers to the effect that his object was to get the total amount of cement required for the building; inasmuch as they modify and change the plain and unambiguous written agreement between the parties. (Specifications 1, 2, 3, a. b. and c.)

In the discussion of this branch of the argument, we shall contend that the letter dated September 24th 1897, "Plaintiff's Exhibit No. 1", together with the immediate unconditional acceptance thereof, constituted the contract between the parties to the exclusion of all else.

In order successfully to maintain this proposition, it becomes essential for us to establish in the first instance that the writing is plain and unambiguous and speaks for itself.

1. At the outset, it must be allowed that the construction of a plain and unambiguous written contract is

exclusively a question of law for the Court.

Scanlan vs. *Hodges*, 52 Fed. 354, 359;
Dawes & Co. vs. *Peebles' Sons*, 6 Fed. 856;
McFadden vs. *Henderson*, 29 So. Rep. 640;
Brawley vs. *U. S.*, 96 U. S. 168, 173;
Goddard vs. *Stoddard*, 17 Wall. 123, 142.

In *Scanlan* vs. *Hodges*, 52 Fed. at p. 359, the Court said:

> "Undoubtedly, the general rule is that the question whether given written instruments constitute a contract, as well as the interpretation of such written instruments when it is determined that they do constitute a contract, belongs to the Court and not to the jury; and this rule is *as applicable to commercial correspondence* as to a formal written contract."

2. And it must be further allowed that, as was said in *Davis* vs. *Shafer* 50 Fed. p. 767,

> "when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the *whole* engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." *1 Greenl. Ev.* Sec. 275.

In *Fowler* vs. *Black*, 136 Ill. at p. 373, the Court declared:

> "This principle excluded parol evidence con-

tradictory of the writing itself even though such evidence might clearly show that the *real* intention of the parties was at variance with the particular intention expressed in the written instrument. And where there is no ambiguity in the terms used, or where the language has a settled legal meaning, the instrument itself is the only criterion of the intention of the parties and its construction is not open to oral evidence."

In *Brawley* vs. *U. S.*, 96 U. S. at p. 173, the Court said:

"Reference is made to the previous negotiations which led to the making of the contract. * * * All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it The Court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

No technical terms are found which need parol explanation.

3. This brings us, naturally, to the key question lying at the very threshold of the present controversy—a consideration of the writing, "Plaintiff's Exhibit No. 1".

Is it a plain and unambiguous writing containing the engagements of the parties, in such terms as import a legal obligation, without any uncertainty as to the

object or extent of such engagement?

Assuming that it stands as such a writing, is a true and correct construction of it, excluding the parol testimony of Mr. Gray respecting prior negotiations, opposed to the interpretation declared by the Court below?

The terms found in the writing are such as commonly appear in ordinary commercial correspondence and have a well settled legal meaning. The only argument that can possibly be advanced, in order to raise the question of an ambiguity regarding any of the words employed, would relate to the terms "about" or "more or less".

But the words "about" or "more or less", in an agreement such as the one under consideration, have a settled legal meaning.

Budge vs. *U. S. Smelting & R. Co.*, 104 Fed. 498;
Brawley vs. *U. S.*, 96 U. S. 168;
Cabot vs. *Winsor*, 83 Mass. 546, 550;
Shickle vs. *Chouteau, etc. Co.* 10 Mo. App. 241–4, (per Thompson, J.). Affirmed by adoption of Judge Thompson's opinion *in toto*, 84 Mo. 161.

It has been held that the words "more or less" are primarily for the protection of the vendor.

Am. & Eng. Encyl. Law, (1st Ed.) V. 15 p. 722;
Shickle vs. *Chouteau Co.*, 10 Mo. App. 245.

The words "more or less" added to a given quantity expressed in a contract, do not create such an ambig-

uity in its terms as to render parol evidence admissible.

Shickle vs. *Chouteau Co.*, 10 Mo. App. 242, 245;
Cabot vs. *Winsor*, 83 Mass. 546;
Budge vs. *U. S. Smelting & R. Co.*, 104 Fed. 498;
Brawley vs. *U. S.*, 96 U. S. 168.

Construction of the writing.

(*a*) Now, no ambiguity existing in the writing calling for any explanation through the medium of parol testimony, the Court below gave to it a wrongful construction.

The said Court ruled that the writing bound Wm. Wolff to sell to Wells, Fargo & Co., as much of Alsen's German Portland Cement as they should require for use in the construction of their building, at the rate of $2.56 per barrel. The Court below, apparently deemed the case of *Brawley* vs. *U. S.*, *supra*, controlling of the one at bar. The contract before the Court here, contains some words found in that of the Brawley case. The determinative words of the agreement in the present case, however, clearly distinguish it from the other contract, and bring it within the principle of the decision of this Court announced in *Budge* vs. *U. S. Smelting & R. Co.*, *supra*.

In the Brawley case, as stated in the Budge case, the view which the Supreme Court took of the particular contract there considered is set forth as follows: "The " contract was not for the delivery of any particular

" lot, or any particular quantity, but to deliver at the " post of Fort Pembina eight hundred and eighty cords " of wood, more or less, as shall be determined to be " necessary by the post commander for the regular " supply, in accordance with army regulations, of the " troops and employes of the garrison of said post, for " the fiscal year beginning July 1st, 1871. * * * " The substantial engagement was to furnish what " should be determined to be necessary by the post " commander for the regular supply for the year, in " accordance with army regulations."

In the present case, the contract consists of the aforesaid letter coupled with its unconditional verbal acceptance promptly communicated by Wells, Fargo & Co.

The letter is easily and naturally separated into two divisions, which, for convenience as well as for a better understanding of the same, may be styled the introductory part and the stating part.

The introductory part consists of the following: " Colonel Geo. E. Gray, 1st Vice President, Wells, " Fargo & Co., City. Dear Sir:—Referring to the con- " versation the writer Mr. Baker had with you this " afternoon, we take pleasure in submitting to you our " quotation on Alsen's German Portland Cement for " use in the new Wells, Fargo Building now in course " of construction."

Outside of naming the evident purpose of the entire letter, viz.: the submission of a quotation on Alsen's

German Portland Cement for the new Wells, Fargo Building, this introductory sentence plainly shows that two things were intended thereby. In the first place, it serves simply to identify the writer as the person who had previously conversed with Mr. Gray concerning Alsen's German Portland Cement. In the next place, it clearly indicates that the writer intends to submit *his* proposition to Mr. Gray for the latter's acceptance, and to merge all previous conversation and negotiation in this *final* act.

An extract from the opinion of the Court in *Shickle* vs. *Chouteau*, *supra*, becomes instructive on this point. At page 246, the opinion declared:

> "The view advanced by the defendant, that the antecedent parol proposition from the plaintiffs, as to which Mr. Fusz testified, was a part of the contract, is clearly unsound. If there had been such a previous proposal, and if it had been embodied in writing, their position would still be unsound; for it is a well-settled rule, in determining what constitutes a contract, that where a proposal is made by one party and accepted by the other party with a modification or limitation, such acceptance is, in law, a rejection of the proposal. If it stands at all, it can only stand as a new proposal. *Benj. on Sales*, sect. 39; *Hyde* v. *Wrench*, 3 Beav. 334; *Hutchison* v. *Bowker*, 5 Mee. & W. 535; *Jordan* v. *Norton*, 4 Mee. & W. 155. That was this case. The letter above set out was, in law, a rejection of any previous offer which the defendant may have made to purchase all the iron in the yard, and a withdrawal of any previous offer which the plaintiffs may have made, if any such was made, to sell the defendant all the iron in the yard."

This introductory statement does not contain language of contract—the parties do not contract anything. It is a statement, as above indicated, to identify the writer in connection with "Alsen's German Portland Cement" which was to go into the new building, and to direct the receiver's attention to the final quotation, or offer, about to follow.

(b) Then comes the stating part of the letter, setting forth the controlling clause, which described the real obligation of the promisor. "We will name you a "price for what you may require, *on* about five "thousand barrels (5000) more or less, of two dollars "and fifty-six cents ($2.56) per barrel, delivered at the "building site, Second & Mission Sts., in quantities to "be designated by you."

The provision, that the barrels should be delivered at the building site, Second and Mission Sts., in quantities to be designated by Wells, Fargo & Co., has reference only to the place and method of delivery and not to the *total* quantity required and to be used. It was purposely inserted to relieve the acceptor of the offer from the obligation of receiving all the purchased material at one time and at the option of Wm. Wolff & Co.

Budge vs. *U. S. Smelting & R. Co.*, 104 Fed. 500.

Culling then from the controlling clause the reference to the "place and method" of delivery, the remaining obligatory words relate to a named *price* for what

the acceptor may require *on* about five thousand barrels more or less.

Here is apt and fitting language binding Wm. Wolff & Co., to maintain a fixed price for what Wells, Fargo & Co., may require, *relying on*, or *concerning*, about five thousand barrels more or less. The first words seeming to grant the acceptor the right to name the quantity required are themselves *supplemented by a limitation*, within whose extent the acceptor would have the undoubted power to decide upon the amount wanted. There is no uncertainty here as to the extent of the legal obligation undertaken by the offering party. The meaning, as plain as language can make it, is that the writer offers to fix a *price* on an article produced abroad, for as much as the other party may require, on about 5000 barrels, more or less. Mr. Gray had instructed Mr. Baker to reduce his proposition to writing—obviously in order that both sides should have the best evidence of their engagements. This, Mr. Baker did in the manner set out; but only after he had returned to the office of Wm. Wolff & Co., where, it is fair to assume, must have been kept all the information and necessary data concerning the stores of "Alsen's German Portland Cement" on hand, the lots to arrive, and the true condition of the present and prospective supplies in Europe. The record makes it manifest that Mr. Baker dictated the letter at the office of Wm. Wolff & Co. (tr. p. 53).

We have previously discussed the settled legal defi-

nition of the words "about" and "more or less" in similar commercial writings relating to sales of goods, and the authorities which declare their meaning to be a question of law for the Court (*supra* pp. 12–13). In view of what has ever been the rule in this regard, the employment of such terms by the vendor must have been for his protection to allow for any slight deficiency due to shrinking in the gross amount of barrels, whether from the caking of cement, the breaking of barrel heads and staves, or what not. And the delivery of exactly 5000 barrels would in law satisfy an engagement to deliver 5000 barrels within a reasonable limit; or, if the engagement of the vendor, because of the insertion of the qualifying words "about" and "more or less", may be lawfully construed to contemplate an excess beyond the said 5000 barrels, it must needs include only such a slight excess as the Court deems will fall within a reasonable limit. It is simply idle to contend that such an excess within a reasonable limit could possibly cover the large number of 2925 barrels, in addition to the 5000 barrels expressly mentioned—that is to say, about 60 per cent. above the same. The authorities upon the subject flatly reject any such view.

But the Court below held that under the doctrines enunciated in the *Brawley case*, the true construction of this writing called upon Wm. Wolff & Co., to furnish as much "Alsen's German Portland Cement" as Wells, Fargo & Co. required for use in their new

building, at the rate of $2.56 per barrel, without any reference to the specific number of barrels mentioned; which should be regarded only as a mere estimate of the parties. We submit that the *Brawley case* does not sustain this nor any construction of the kind.

No such *determinative* words as pointed the conclusion of the Court in the *standard case* can be found in the writing in question. The determinative words in the present instance, at the risk of repetition, are plainly: "We will name you a price for what you may " require, *on* about five thousand (5000) barrels, more " or less." In order to justify its own construction, the Court below would have to introduce the phrase "the whole of" before the words "what you may require"; and, moreover, it certainly would find it absolutely necessary to render idle and inoperative the term "on" (meaning relying on or concerning) immediately preceding "about five thousand (5000) barrels more less", and to erase it entirely from the obligatory clause. This the Court may not do. And the failure to so provide any express phrase denoting a clear intent to furnish *all*, or *the whole of*, the cement, and the purposeful introduction of the limiting term "on" furnish a clear and unmistakable guide as to the true interpretation to be put upon the writing. And no sound reason can be advanced why the promisor would not have employed similar words such as the universal "all" or "the whole of", and have omitted therefrom the limiting introductory term "on", if his

intention conformed with the construction of the Court. If the intention embodied in the offer coincided with the construction placed upon the instrument by the trial Court, it would have been expressed differently.

The mere fact that in the introductory part of the letter appears the expression, "For use in the new Wells-Fargo Building", can have no material effect upon the obligatory clause which stated the quotation offered for acceptance. The cement, surely, would be intended for the building, whether or not the writing be deemed an engagement to supply any portion of the specified amount of barrels at a fixed price. In *Budge* vs. *U. S. Smelting & R. Co.*, the contract considered expressly declared that all the mining timbers were to be required and used in a particular mine, specially contemplated and designated in the contract between the parties there involved.

Finally, reading together the sentences heretofore artificially styled by us as the introductory and the stating parts of this writing and constituting the whole of it, there remains no escape from the inevitable conclusion that it formulates an engagement on the part of the suppliers of Alsen's German Portland Cement, to furnish at a named price as much thereof as the receivers may require out of a specific quantity. And upon the complete delivery of the full number of barrels expressed, both parties would occupy an equal position to enter into new and further engagements respecting the price of an article produced only abroad and arriv-

ing at San Francisco irregularly in sailing vessels, and in uncertain quantities. Besides such an interpretation keeps in harmony with justice as well as with the fair meaning of the language used. It fails to put the one party entirely within the power of the other.

In case the construction given by the Court below should prevail, however, the receivers of the foreign cement could have demanded of the suppliers as much as fifty thousand or one hundred thousand barrels just as reasonably; provided they subsequently changed the plans and specifications of the work to be performed and extended the width, height or other dimensions of the structure accordingly, in order to conform with the requirements of an enlarged business, not originally contemplated, or for some other purpose respecting the reasonableness of which they alone might determine. The Court should hesitate long before reaching such an unjust conclusion, and *then* only when no other reasonable construction of the writing may be allowed. A Court should not repudiate a just interpretation, and prefer one which places burdens upon a contracting party grossly disproportionate to those claimed for the other.

One other point deserves some attention before leaving this head of the argument. In the *Budge Case* it was decided that the Smelting & Refining Company expressly agreed to pay for about fifteen thousand lagging and for about six hundred mining timbers, and must be held bound to its express promise to pay for

the same. Although no express promise on the part of Wells, Fargo & Company to pay for about five thousand (5,000) barrels appears on the face of the writing, still an *implied* promise to pay for the same resulted from their prompt unconditional acceptance of the offer. There can be no lawful distinction between an obligation resulting from an express promise to perform and an implied one clearly established. Both are equivalent as to the extent of the legal obligation undertaken. The only difference lies in the nature of the evidence required in order to make the necessary proofs of the respective cases.

Parsons on Contract, Vol. 1 (8th Ed.), p. 6, Note 1.

An observation of Sir Montague Smith in a case which came before him is quite appropriate to the present discussion. He said:

> "In questions of difficult interpretation not only two, but frequently many constructions may be suggested. And after all there must be one true construction. And if that true construction can be arrived at with reasonable certainty although with difficulty, then it cannot properly be said that there are two meanings to the contract."

If our views prevail as to the true construction of the letter, then the Court's action in reference to it can be explained in but one of two ways. It either regarded the writing as plain and unambiguous or it did not. If it did, then the construction placed upon it, being a pure question of law, makes the error strikingly manifest. If it deemed that writing am-

biguous, which is plainly not so, then the parol testimony of Mr. George Gray of previous conversations, to the effect that he contracted for the *total* amount of the cement required for the new building, could not explain away an ambiguity which had no existence *in truth*; but it did tend, on the other hand, to modify and change the terms and legal obligation of the plain written agreement itself; and the admission of such testimony immediately became error prejudicial to the Plaintiff in Error.

In case the views and reasons urged are well grounded, the judgment should be reversed for the error committed.

II.

The Court erred (1) in refusing to permit the witness, Wm. Wolff, to answer the question: "Did you reserve that amount of cement for them?"; and (2) in refusing to permit the witness Edmund Baker to answer the question: "What did you do after you were notified by Mr. Percy that they had accepted your proposal?"

What has been heretofore said in the preceding argument assumes that the letter is plain and unambiguous, and must be construed without the aid of parol testimony in order to know the real engagement therein contained. Suppose, however, that some ambiguity exists in reference to the true engagement. In that event, we maintain that the conduct of the writer and

his acts done in relation to the very subject matter under consideration immediately upon the acceptance by the other, and long before any controversy arose, become material for the purpose of ascertaining the real intention. And from this point of view the witnesses should have been allowed to answer the questions.

In *Budge* vs. *U. S. Smelting & R. Co.*, *supra*, the conduct of the plaintiff in that case, away from the presence of the defendant, received consideration in the decision of the Court. The acts done by the plaintiff immediately after the execution of the contract, such as securing teams and cutting and hauling timbers, must have been deemed material and relevant as bearing upon the true meaning of the contract, otherwise such matters would have no proper place in the Court's opinion which dealt with this one question. For, if such particular acts were indeed immaterial and irrelevant upon that question, it would have sufficed the Court in its opinion to declare that the plaintiff there had offered to deliver all of the timbers required, as provided in the contract, and to have omitted the special details describing the conduct of the one party before there was any controversy.

See

Auzerais vs. *Naglee*, 74 Cal. 60, 67;
Block vs. *Columbian Ins. Co.*, 42 N. Y. 393;
Knight vs. *New England Worsted Co.*, 56 Mass. 271;
Chicago vs. *Shelton*, 9 Wall. 50.

III.

The Court erred (1) in striking out the answer of witness Baker as follows: "I called on Mr. Percy * * and on this instance informed him that I was holding the undelivered quantity of 5000 barrels for Wells, Fargo & Company, and he said very well that was all right;" (2) in striking out the answer of witness George W. Percy as follows: "He (Edmund Baker) told me he was going away to be gone some weeks; that he had caused the entire 5000 barrels that we should require at the Wells, Fargo & Company's Building to be stored in the warehouse subject to our orders."

The conversations alluded to occurred about December 12th, 1897, two and one-half months after the acceptance of the letter by Wells, Fargo & Company, and long before any shortage in the supply of cement became apparent to Mr. Percy, the architect for the Company, who had charge of the work.

The record shows that Mr. Percy first purchased additional cement for Wells, Fargo & Company on May 21st, 1898, more than five months after the conversation between himself and Mr. Baker relating to "Alsen's German Portland Cement" on hand for the Wells, Fargo & Company Building (Tr. pp. 45, 51).

Moreover, it appears that as soon as Mr. George E. Gray accepted the offer embraced in the letter of September 24th, 1897, he advised Mr. Percy of that fact (Tr. p. 33). From this evidence it may be fairly and

plainly inferred that the question of the cement supply was well understood by the architect employed to attend to the work of construction. We contend that he was the agent of the Defendant in Error and entrusted by it with authority to take necessary steps in order that a proper supply of cement should always be on hand, having a due regard for the existing contract with Wolff & Co.

There is no way of explaining the action of Mr. Percy during May, 1898, at the time that he secured the additional cement and had the same billed to Wells, Fargo & Company, unless he was clothed with such an authority from the very moment that Mr. Gray advised him of "Plaintiff's Exhibit A". The answers, if allowed to stand, would have been evidence to prove that the agent of Wells, Fargo & Company, its own architect, the man of all men responsible for the work of construction and whose duty arising therefrom would naturally induce him to ascertain the true meaning of the engagement of Wm. Wolff & Company, acted upon the fact that it contemplated but 5000 barrels of cement. The action of the architect during the month of December, 1897, in deciding that Wm. Wolff & Company were all right in maintaining a supply of cement up to the number of 5000 barrels must be regarded as material evidence, if it be allowed that an ambiguity in the writing should be cleared.

IV.

The Court erred in refusing to make a rule that the contract as plead by the plaintiff was at variance with the contract proved.

Plaintiff in Error presented this proposition of law to the Court for a decision during the progress of the trial. True, the proposition was only in the form of a motion for a nonsuit when the plaintiff below rested. But in case this Appellate Court adopts the view that the writing was plain and unambiguous, it constituted the only evidence containing the true engagement of the parties; and all further evidence introduced tending to vary or modify the writing became straightway immaterial, irrelevant and incompetent. We are aware of the well established doctrine that a defendant in the trial Court waives his exception to the action of the Court in overruling a motion for a nonsuit, if he then sees fit to introduce evidence on his own account. But the reason for this rule lies in the fact that frequently a *defendant* supplies a missing link in the evidence so as to make out a case for the plaintiff, where none existed at a point in the trial when the motion of nonsuit was entered and denied (*Boyle* vs. *Gassert*, 149 U. S. 17). When the reason of the said rule ceases in a particular case, we submit that the rule itself falls. The motion for nonsuit in this particular case on the ground now discussed, dealing only with the plain and unambiguous agreement became equivalent to a submission of a

proposition of law to the Court consistent with a theory of the case adopted by defendant throughout the entire trial. At any rate, the Court's refusal to accept such a proposition of law advanced, proves that it rejected and disallowed the fundamental view of the case taken by the defendant.

V.

The remaining specifications should be considered, if necessary to do so, for the purpose of reviewing error regarding a question of law made plain by the record.

We do not contend that any question of *fact as such* should be now reviewed by virtue of any of the assignments relating to the findings. We do claim, however, that in case a plain error of law has been committed, then the Court will consider it, if clearly established by the record.

These remaining specifications of error, although perhaps inartificially and unskillfully drawn, were allowed by the Judge below; and in connection with such as have been previously discussed in this brief should be regarded as sufficient to call attention here to the principal question of law for consideration—the true construction of a plain and unambiguous writing—which was understood by the Court below and both parties to be fundamental. All knew what the question was.

In *National Cash Register* vs. *Leland*, 94 Fed. page 507, the Court decided:

> "It is settled however that a plain error may be noticed by the Appellate Court though the exceptions are irregularly taken. *Wiburg* vs. *U. S.*, 163 U. S. 632, 659. Rule 11 of this Court (90 Fed. CXLVI) recognizes this principle in allowing the Court, at its option to notice a plain error not assigned. The record shows clearly that the question * * * which is the principal question left for consideration was understood by the Court below and by both the parties to be fundamental. All knew what the question was. The attention of the learned Judge had been called to it, and he had it most plainly in mind when refusing the plaintiff's requests. * * * As to the form in which the exceptions to the refusal to give the rulings requested were taken, it may be sufficient to say as was said in *Hicks* vs. *U. S.*, 150 U. S. 442, 453; 14 Sup. Ct. 144, 'The learned Judge below seems to have been satisfied with the shape in which the exceptions were presented to him, and we think they sufficiently raise the questions we have considered. *Lucas* vs. *U. S.*, 163 U. S. 612, 618.' "

It is but fair to the learned Judge of the Court below to say that, after trial and argument, he expressed the hope that this Appellate Court would be asked to pass upon the question, "What is the true construction to " be given Plaintiff's Exhibit A?"

Wherefore by reason of the errors committed and considered in the foregoing argument, we respectfully pray that the judgment be reversed.

VOGELSANG & BROWN,
Attorneys for Plaintiff in Error.

No. 699

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BOISE CITY, a Municipal Corporation of the State of Idaho, *Appellant*,

vs.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA O'FARRELL, ANGELINE O'FARRELL, and R. E. EMERSON, *Appellees.*

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

FILMER-ROLLINS CO. PRINT, 424 SANSOME ST., S. F.

INDEX.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.

ROBERT B. WILSON, JOHN A. O'FARRELL, and R. E. EMMERSON,

Plaintiffs,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States, District of Idaho, Central Division:

The plaintiffs herein, Robert B. Wilson, John A. O'Farrell, and R. E. Emmerson, present this their bill of complaint against Boise City, a municipal corporation of the State of Idaho, a corporation organized and existing under and by virtue of the provisions of an act of the legislative assembly of the territory of Idaho, approved January 11, 1866, entitled "An act to incorporate Boise City, in Ada County," and of the several acts amendatory thereof and supplementary thereto. And thereupon your orator complains and says:

I.

That said Boise City is a municipal corporation, organized and existing under and by virtue of the provisions

of an act of the legislative assembly of the territory of Idaho, approved January 11, 1866, entitled "An act to incorporate Boise City, in Ada County," and of the several acts amendatory thereof and supplementary thereto.

II.

That the complainants are now, and for a long time hitherto have been in severalty, the owners of in fee and in the possession of those certain lots, pieces, or parcels of land situate, lying, and being in the county of Ada, State of Idaho, and hereinafter particularly described.

III.

That by the provisions of the act of the legislature of the State of Idaho approved March 12, 1897, and entitled "An act to amend sections three, five, and eleven of the act incorporating the city of Boise, approved January 11, 1866, being sections 130, 132, and 138 of special and local laws of Idaho, and under subdivision 27 of section 2 of said act, it is provided that the mayor and common council shall have full power and authority within Boise City, as follows: Twenty-seventh.—To divide the city into convenient sewer districts, and upon a petition of a majority of the resident property owners of any such district to provide for the construction of, and to construct sewers within such district; the expense thereof to be defrayed by special assessments upon the property contiguous to, or abutting or fronting upon the street, alley, avenue, or lane through or along, or on the line of which the sewer may run. Such special assessment to be ap-

portioned, levied, and collected in the same manner as provided in subdivision 26 of this section.

IV.

That on the 28th day of March, 1898, at a meeting of the common council of the said Boise City, the following ordinance was passed by said common council and approved by the mayor on the 29th day of March, 1898, to wit:

Ordinance No. 249.—An ordinance relating to the construction of a sewer in sewer district number two, which embraces all that part of Boise City lying between Hays and Franklin streets of said city, commencing at the sewer main, situate in Thirteenth street, running thence easterly to the east boundary line of said city, in Boise City, Idaho.

Be it ordained by the mayor and common council of Boise City, Idaho:

Section 1. A sewer is hereby ordered to be laid and constructed in the alleys of sewer district number, which embraces all that part of Boise City lying between Hays and Franklin streets, commencing at the sewer main, situate on Thirteenth street, running thence easterly to the east boundary line of said city, in Boise City, Idaho.

Sec. 2. Said sewer is to be laid and constructed in accordance with the ordinances of Boise City relative to the same, and under the supervision of the city engineer, and satisfactory to the common council of Boise City, Idaho.

Sec. 3. The cost and expense of laying and construct-

ing the sewer ordered to be laid and constructed by sec. 1 of this ordinance shall be defrayed by a special assessment to be levied upon and against all property fronting on or abutting upon said alleys situate and lying between Hays and Franklin streets, commencing at the sewer main on Thirteenth street of said city, running thence easterly to the east boundary line of said city.

And the extra expense of laying and constructing said sewer under cross streets, constructing manholes, flushing tanks, foot-vents and making connections with the water supply for flushing, shall be borne and paid by all the property owners in that part of said sewer district referred to in section one of this ordinance, each property owner paying such proportionate part of the whole of said extra expense, as his frontage on said alley bears to all the property referred to in said section one, which said assessment shall be a lien upon said property until the same is fully paid, from the date of the levy thereof.

Sec. 4. This ordinance shall be enforced and take effect from and after its passage by the council and approved by the mayor.

Passed the common council this 28th day of March, 1898.

Approved this 29th day of March, 1898.

M. ALEXANDER,
Mayor.

Attest: P. H. BLAKE,
Clerk.

V.

That on the same date and at the same meeting of the common council of the said Boise City the following ordinance was also passed, to wit:

Ordinance No. 250.—An ordinance relating to the construction of a sewer in sewer district number three, which embraces all that part of Boise City lying between Franklin and Washington streets, commencing at the sewer main situate on Thirteenth street in said city, running thence easterly to the east boundary line of said city, in Boise City, Idaho.

Be it ordained by the mayor and common council of Boise City, Idaho:

Section 1. A sewer is hereby ordered to be laid and constructed in the alleys of sewer district number three, which embraces all that part of Boise City lying between Franklin and Washington streets of said city, commencing at the sewer main on Thirteenth street, running thence easterly to the east boundary line of said city, in Boise City, Idaho.

Sec. 2. Said sewer to be laid and constructed in accordance with the ordinances of Boise City, relative to the same, and under the supervision of the city engineer, and satisfactory to the common council of Boise City, Idaho.

Sec. 3. That cost and expense of laying and constructing the sewer ordered to be laid and constructed by section one of this ordinance shall be defrayed by a special assessment to be levied upon and against all property fronting or abutting upon said alleys situate and lying

between Franklin and Washington streets, commencing at the sewer main on Thirteenth street of said city, running thence easterly to the east boundary line of said Boise City. And the extra expense of laying and constructing said sewer under cross streets, constructing manholes, flushing tanks, foot-vents, and making connections for water supply for flushing, shall be borne and paid by all the property owners in that part of said district referred to in said section one of this ordinance each property owner paying such proportionate part of the whole of said extra expense, as his frontage on said alley bears to all the property referred to in said section one, which said assessment shall be a lien upon said property until the same is fully paid, from the date of the levy thereof.

Sec. 4. This ordinance shall be enforced and take effect from and after its passage by the council and approved by the mayor.

Passed by the common council this 28th day of March, 1898.

Approved this 29th day of March, 1898.

M. ALEXANDER,
Mayor.

Attest: P. H. BLAKE,
Clerk.

VI.

That after such proceedings were had, then a contract was let in accordance with the terms of the above ordinance, and the work of constructing the said sewers re-

spectively was commenced and completed thereunder in the above-named districts as provided for in the said ordinances.

VII.

That on the 4th day of November, 1898, at a meeting of the common council of Boise City, an ordinance was passed by the said common council and approved by the mayor.

Said ordinance being entitled number 266: An ordinance providing for the levying of assessment to pay the costs and expenses for laying and constructing sewers in sewer district number two embracing all that part of Boise City lying between Hays and Franklin streets, commencing at the sewer main, situate on Thirteenth street and extending to the east boundary line of said Boise City; also in sewer district number three, embracing all that part of Boise City lying between Franklin and Washington commencing at the sewer main, situate on Thirteenth street, and extending to the east boundary line of the said Boise City, Idaho.

That the said ordinance so passed and approved by the mayor provided:

Section 1. That for the purpose of defraying the cost of laying and constructing sewers in sewer district numbers two and three, as provided in ordinances 249 and 250, and in accordance with other ordinances of Boise City, relative to the laying and constructing of sewers from the sewer main, situate on Thirteenth street and extending to the east boundary line of said city line between Hays and Franklin streets in said city; also

from the sewer main, situate on Thirteenth street, and extending to the east boundary line of said city line between Franklin and Washington streets in Boise City, Idaho.

And thereupon by said ordinance it was provided that there should be levied and there was levied by the said city council upon and against all property fronting or abutting upon, or contiguous to that portion of sewer districts numbers two and three above described, including intersections of streets, constructing manholes, flushing tanks, foot-vents, making connections for water supplies for flushing and defraying the city expenses of the city engineer in giving grades, etc., a local or special assessment of 62.82 cents per linear foot for each linear foot of property represented in said districts.

The respective amounts of said assessment chargeable against each lot, piece, or parcel of said property owned by these complainants being as follows, to wit, according to the official plat of Boise City, Idaho:

Lots 1 to 11, inclusive, block 104	$421.08
Lots 1, 2, 7 and 8, block 96	145.80
Lots 5, 6, 10, 11 and 12, block 97	182.07
Lots 1 to 12, inclusive, block 99	435.51
Lots 1, 2, 3, 4, and north fraction of block 128	276.23
Lots 11 and 12, block 100	73.43

The said ordinance provided further that the assessments levied by the same should be due and payable by the owners of said property to the city tax collector on the first day of December, 1898, and if not paid before said date the same should be and become delinquent.

The same ordinance contained the following provisions that a penalty of 15 per cent on all delinquent assessments must be added for delinquency, and must be collected when delinquent assessments are collected, together with costs of collections.

That within ten days after the said first day of December, 1898, the city tax collector should make a list of all property on which said assessments are delinquent, showing the particular tracts and the names of the owners or reputed owners; and shall immediately cause said list to be published for ten days within Boise City. At the expiration of such publication all property on which said assessments are not then paid shall be sold by the city tax collector at the city hall to satisfy said assessments and penalty and costs.

That notice of said sale shall be given and be published for and during the time the delinquent list is published and in connection therewith. Such sales shall be conducted in the same manner and have the same effect as sales of property for delinquent taxes; and the ordinances of Boise City relative to sales for delinquent property so far as they may be applicable shall govern the issuance of certificates of sales. That there should be established in the city treasury a fund to be known as the second and third district sewer fund.

That all moneys collected on account of the assessments by this ordinance levied shall be paid into the city treasury to the credit of said fund, and shall be paid only on warrants drawn against said funds. Such warrants shall draw interest at the date of issuance at the

rate of eight per cent per annum until called for payment; and the said assessments were by the same ordinance declared to be a lien against the property upon and against which they are levied, from the passage and approval of this ordinance until said assessments are wholly paid and satisfied.

VIII.

That neither by said ordinance nor by the act above referred to as amendatory of the city charter, nor by any other act of either the legislature or of the city council of Boise City, is there any provision whatever, nor any means pointed out by which the assessment can be made against the lots and blocks herein mentioned according to the benefits conferred on each distinctive lot or parcel of property as therein described and set forth.

And said assessment levied by virtue of said ordinance 266 levies and assesses each lot or parcel of ground abutting upon said sewer with the full amount of the cost of the sewerage, expenses of engineer, and other costs and expenses; that the said assessment is wholly arbitrary and has no reference whatever either to the value of the lots upon which the assessment is made, the benefits conferred upon said lots, nor the damages, if any, resulting from the building of said sewer.

IX.

That heretofore, to wit, in the year 1895, sewers were built and constructed by said city from Thirteenth street to the east line of said city along the alleys of each block respectively, running east and west between Washington

street and Front street, and the whole cost of said sewerage is assessed upon the whole city of Boise City, and the bonds of said Boise City issued therefor.

That the plaintiffs in this cause are obliged to pay their proportionate share of the taxes of said city for the construction of last mentioned sewerage, and the whole of the cost of the sewerage in sewer districts numbers 2 and 3, as provided for in the ordinances numbers 249 and 250, above set forth.

X.

That Mrs. Carrie E. Myers is the duly elected, qualified, and acting tax collector of said Boise City, Idaho; that in accordance with and under and by virtue of said ordinance number 266, as above set forth, the said Carrie E. Myers, as such city tax collector of Boise City, Idaho, did cause to be advertised for sale at the city hall, in Boise City, on June 20, 1899, the above-described real estate for the delinquent tax and the costs as above set forth; which said tax and assessments were levied against said property for the purpose of constructing the sewers above described and set forth as having been constructed between Hays street on the north and Washington street on the south.

XI.

That said sale did take place as advertised on June 20th, 1899, and the tax collector of said Boise City, did sell at such sale the several pieces, parcels, and tracts of land belonging to these plaintiffs and thereinbefore described to pay said assessment so as aforesaid levied for

the purpose of constructing said sewer; and that at said sale the said Boise City, defendant herein, did purchase each of said pieces, parcels, or tracts of land hereinbefore described. That the complainants are the owners in severalty and in fee of the above-described tracts of land which were sold for said assessment to said Boise City, respectively, as follows, to wit:

That Robert B. Wilson is the owner of lots 1 to 11, inclusive, in block 104, Boise City, Idaho.

That R. E. Emmerson is the owner of lots 1, 2, 7 and 8 in block 96, Boise City, Idaho.

That John O'Farrell is the owner of lots 5, 6, 10, 11 and 12 in block 97; of lots 1 to 12, inclusive, in block 99; of lots 11 and 12 in block 100, and the whole of the fractional block numbered 138 containing about one acre of ground all in Boise City, Idaho. That the whole of said lots, blocks, and parcels of land are situate in the said city of Boise, in the county of Ada and in the State of Idaho, and all within said sewer district hereinbefore set forth and described in said ordinances of Boise City, herein referred to.

XII.

That the property of each of the complainants herein as above described exceeds in value the sum of two thousand ($2,000) dollars, exclusive of interest and costs. That sections 5 and 6 of chapter 11 of the ordinances of Boise City provide as follows, to wit:

Sec. 5. When real estate is sold for taxes the purchaser shall be substituted to and acquire all the right, title, interest, and claim of the tax debtor; and when

the estate is less than a leasehold for two years' unexpired term, the sale shall be absolute. In all other cases of sale of real estate the property shall be subject to redemption within six months after the sale on paying the purchaser the amount of his purchase, with eighteen per cent thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon. Upon the sale the collector shall give the purchasers a certificate of sale containing: 1st. A particular description of the real estate sold; 2d. The price bid for each district, lot, or parcel; 3d. The whole price paid; 4th. When subject to redemption it shall be so stated.

Approved September 6th, 1875.

Sec. 6. On application of any party entitled to a deed of any real estate sold for taxes as aforesaid, after the expiration of the time of redemption, and on the presentation of the certificate of sale, hereinbefore mentioned, the mayor shall execute such deed as prescribed in the charter of said Boise City.

Approved September 6th, 1875.

XIII.

That in accordance with said sections 5 and 6 of said ordinances, the tax collector of said Boise City, Idaho, did, on the 21st day of June, 1899, issue give, and deliver to said Boise City, the purchaser at said tax sale, a certificate of sale in due and legal form for each and all the lots, pieces, and parcels of land of these complainants above described. The certificate of sale containing:

1st. A particular description of the real estate sold;

2d. The price bid for each district, lot, or parcel;

3d. The whole price paid; and

4th. When subject to redemption.

XIV.

That the claim of said defendant is without any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in said land or premises or any part thereof. That by reason of the proceedings aforesaid a cloud has been cast upon the title of said property of the complainants and each and every part thereof; and by reason of the defendant's adverse claim the complainants are greatly embrassed in the use and disposition of their said property, and that thereby the value is greatly depreciated.

XV.

That this action is brought to prevent a multiplicity of suits, and to prevent great and irreparable injury to the plaintiffs herein. That under and by virtue of the laws of this State the sale of said property, for the above taxes or assessments, did and will cause a cloud upon the title of the same.

That these plaintiffs have no speedy or adequate remedy at law. That the above taxes and assessments are void and illegal for the following reasons:

XVI.

That the pretended act of the legislature of the State of Idaho, approved March 12, 1897, entitled "An act to amend sections 3, 5, and 11 of an act incorporating the

city of Boise, approved January 11, 1866, being sections 130, 132 and 138 of the special and local laws of Idaho, was never in fact a law of this State.

That said act or pretended act was not read on three several days in each house of the legislature; and that the provision of section 15, article 3 of the constitution providing for a reading of every bill upon three several days in each house previous to its final passage was not complied with, nor was it dispensed with in either of the two houses of the said legislature when said bill was pending therein, by a vote of the ayes and nays of the members, or otherwise, of each or either of said houses wherein it was so pending.

That the several amendments made by either house to such bills were not read on three several days in each house or in either house as required by the constitution of the State of Idaho.

And section 15 or article three was not suspended during the enactment of said amendments, or either of them.

XVII.

That the only right or authority possessed by said defendant corporation to make improvements above referred to, or to tax or assess the costs of the same against these plaintiffs is, under and by virtue of the provisions of said act of the legislature and city ordinances above referred to, which said act is wholly void.

XVIII.

That no proceedings have ever been had, nor has there been any hearing of any kind, or opportunity to be heard,

or any adjudication of any kind whatever as to the benefits, if any, accruing or to accrue to the said lands above described, or to any of them by reason of the construction of said sewerage system.

XIX.

That said city charter and the said city ordinances above referred to, and the levy and assessments of the taxes above referred to, thereunder are void and illegal in this:

That they are in violation of the provisions of the 14th amendment to the constitution of the United States which declares: "Nor shall any State deprive any person of life, liberty, or property without due process of law"; and in violation of the 5th amendment of the constitution of the United States, which declares: "No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation"; and also in violation of that provision, section 13, article 1 of the constitution of the State of Idaho, which declares: "No person . . . . shall be deprived of life, liberty, or property without due process of law, and constitutes a taking of private property for public use without just compensation being paid therefor."

XX.

That no part of said property hereinbefore described has been redeemed from said tax sale, as hereinbefore set forth; and said tax sale and the proceedings herein set forth constitute a cloud upon the title to said property.

XXI.

To the end, therefore, that the complainants may have the relief which they can only obtain in the court of equity, and the respondent may answer in the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by complainants, that by decree of this Court it be declared and adjudged that the respondent has no estate or interest whatever in or to said pieces or parcels of land, or the premises hereinbefore described, and that the title of each of the complainants herein is good and valid as to their said property herein described; and that said tax certificate hereinbefore described or any tax deed which may have been issued to said Boise City based upon said tax sale certificate be by decree of this Court canceled and held not to be a cloud upon the title of any of the property of these complainants herein described, and for such other relief as may to this Honorable Court seem meet and agreable to equity.

May it please your Honors to grant unto these complainants a writ of subpoena directed to the said Boise City, commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true, correct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide by such further order, direction, or decree therein as to this Honorable Court shall seem meet and agreeable to equity and good conscience.

ROBERT B. WILSON.

ALFRED A. FRASER,

Solicitor for and of Counsel for Complainants.

State of Idaho, } ss.
County of Ada. }

Robert B. Wilson, being first duly sworn, deposes and says that he is one of the complainants in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters herein stated to be on information and belief, and as to those matters he believes it to be true.

ROBERT B. WILSON.

Subscribed and sworn to before me this 31st day of July, 1900.

[Seal] WALTER S. WALKER,
Notary Public.

[Endorsed]: No. 183. In the Circuit Court of the United States, District of Idaho, Central Division. Robert B. Wilson et al., Complainants, vs. Boise City, Defendant. Bill of Complaint. Filed August 2d, 1900. A. L. Richardson, Clerk. Alfred A. Fraser, Attorney for Complainants.

In the Circuit Court of the United States for the Central Division of the District of Idaho.

IN EQUITY.

ROBERT B. WILSON, JOHN A. O'FARRELL, and R. E. EMMERSON,
Complainants,
vs.
BOISE CITY, a Municipal Corporation of the State of Idaho,
Defendant.
No. 183.

Subpoena ad Respondendum.

The President of the United States of America, to Boise City, a Municipal Corporation of the State of Idaho, Greeting:

You, and each of you, are hereby commanded that you be and appear in said Circuit Court of the United States, at the courtroom thereof, in Boise, in said District, on the first Monday of September next, which will be the third day of September, A. D., 1900, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein Robert B. Wilson, John A. O'Farrell and R. E. Emmerson are complainant and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpoena and to have then and there the same.

Hereof fail not.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of our said Circuit Court, affixed at Boise, in said district, this 3d day of August, in the year of our Lord one thousand nine hundred and , and of the Independence of the United States the one hundred and twenty-fifth.

[Seal] A. L. RICHARDSON,
Clerk.

Memorandum pursuant of Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso.*

I certify that I made service of the within subpoena ad respondendum upon J. H. Richards, mayor of said Boise City, by showing the original and leaving with him a copy of same, together with a certified copy of the complaint on the 3d day of August, 1900, at Boise, Idaho.

August 3, 1900.

Fees 4.00.

F. C. RAMSEY,
United States Marshal.

[Endorsed]: No. 183. In the Circuit Court of the United States for the Central Division of the District of Idaho. In Equity. Robert B. Wilson et al., vs. Boise City. Subpoena ad Respondendum. Returned and filed, August 6th, 1900. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.

ROBERT B. WILSON, A. A. O'FARRELL, and R. E. EMMERSON;
Plaintiffs,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho,
Defendant.

Appearance of Solicitor for Defendant.

To A. L. Richardson, Clerk of the Above-named Court:

You will please enter my appearance as solicitor and counsel for defendant, Boise City, in the above-entitled cause.

Dated September 1st, 1900.

(Signed) C. C. CAVANAH,
Solicitor and Counsel for Defendant, Boise City.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al., vs. Boise City. Appearance. Filed September 1, 1900. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Central Division of the District of Idaho.

ROBERT B. WILSON, JOHN A. O'FARRELL, and R. E. EMMERSON,

Plaintiffs,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Defendant.

Demurrer of Boise City.

Demurrer of the defendant, Boise City, a municipal corporation of the State of Idaho, above named, to the bill of complaint of the above-named plaintiffs.

This defendant, Boise City, by protestation, not admitting, confessing, or acknowledging all or any of the matters and things in and by said plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, does demur to the said bill of complaint, and for cause of such demurrer shows:

I.

That the said complainants have not in and by their bill of complaint herein made or stated such a case as doth or ought to entitle them, or either of them, in a court of equity, to any such discovery or relief as in

thereby sought, and prayed for, from, or against this defendant, and it appears by the said complainants own showing that no grounds of equity are alleged or stated in said bill, and no facts set forth to entitle a court of equity to proceed and determine the suit or grant the relief prayed for.

II.

That it appears by the said bill of complaint that the same is exhibited by the said plaintiffs against this defendant, Boise City, for distinct matters and causes in several, as appears by said plaintiffs' own showing that they are not in any manner in common or jointly interested or concerned, and are different owners of distinct and separate pieces and parcels of real property, and that the said bill of complaint is multifarious.

III.

That it appears by the said bill of complaint that the same is exhibited by the said plaintiff, Robert B. Wilson, and the several other persons therein named as plaintiffs thereto, for several distinct matters and causes that have no relation to or dependence upon each other, and that there is a misjoinder of parties plaintiffs therein as it appears by said plaintiffs' own showing; that there is no community or joint interest between the said plaintiffs in regard to the matter in dispute, and that said plaintiffs are different owners of distinct and separate pieces and parcels of real property, and that they are joined simply for convienence in bringing suit.

IV.

That it appears by the said plaintiff's bill of complaint that this Court has no jurisdiction to hear and determine the matter stated in said bill of complaint, because said plaintiffs have failed to show by their said bill of complaint that the said city charter, ordinances, levy of assessments, or the subject matter of the action mentioned and referred to in said bill of complaint are in violation of the provisions of the 14th amendment of the constitution of the United States or the laws of the United States, or in violation of the provisions of section 13, article I of the constitution of the State of Idaho, but, on the other hand, it is shown by said bill of complaint of said plaintiffs that the said city charter and ordinances are not, and the said levy of said assessments are not, and were not, made and levied in violation of the said 14th amendment to the constitution of the United States or the law of the United States, or the provisions of section 13, article I of the constitution of the State of Idaho, as the same were made and levied according to the number of front foot of property of said plaintiffs abutting upon or contiguous to that portion of said sewer districts numbers two and three mentioned in said plaintiff's bill of complaint.

Wherefore, and for divers other good reasons of demurrer appearing in the said bill of complaint, this defendant doth demur thereto, and prays judgment of this Honorable Court whether it shall be compelled to make any answer to said bill of complaint, and humbly prays

to be hence dismissed with its reasonable costs in this behalf incurred.

C. C. CAVANAH,
Solicitor for Defendant.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in law.

C. C. CAVANAH,
Solicitor and Counsel for Defendant, Boise City.

State of Idaho, }
County of Ada. } ss.

C. C. Cavanah, being first duly sworn, upon his oath deposes and says: That he is the solicitor for defendant, Boise City, and that the foregoing demurrer is not interposed for delay. That the reason he makes this affidavit instead of the defendant is that said defendant is a municipal corporation of the State of Idaho, and that J. H. Richards, mayor of said defendant, is not present at Boise City, Idaho, and that to affiant's best knowledge and belief the said J. H. Richards is not on this date and at the time of making this affidavit in Boise City, Ada County, Idaho. That affiant is the duly elected, qualified, and acting city attorney of said defendant, and therefore he makes this affidavit.

C. C. CAVANAH,

Subscribed and sworn to before me this 29th day of September, 1900.

A. L. RICHARDSON.
Clerk.

[Endorsed]: No. 138. In United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Demurrer of Boise City. Filed September 29th, 1900. A. L. Richardson, Clerk. C. C. Cavanah, Solicitor for Defendant, Boise City.

In the Circuit Court of the United States for the District of Idaho.

ROBERT B. WILSON et al.,
Complainants,
vs.
BOISE CITY,
Defendant.

Opinion on Demurrer.

Alfred A. Fraser, Attorney for Complainants.

C. C. Cavanah, Attorney for Defendant.

The complainants own city lots within Boise City, and within certain sewer districts established by defendant, in which it ordered that sewers be constructed along the alleys back of the said lots, and that the cost of construction be paid by the owners of the lots at a uniform sum for each lineal foot abutting upon the line of the sewer. The sewer has been constructed and is in use; the assessment for the payment of its cost has been made, and complainants having failed to pay, their property was sold, and this action is brought to restrain the execution of deeds for the property, in pursuance of such sale. To

the complaint the defendant interposes its demurrer, in the consideration of which the following questions occur:

(1) Of the joinder of all complainants in one action; (2) Whether the State statute in pursuance of which the defendant proceeded was constitutionally enacted; and (3) whether the mode of assessment pursued is in violation of the 14th amendment of the constitution of the United States.

(1) There is not a settled rule as to the joinder of parties in such cases. If they were so joined for the purpose of uniting different sums claimed, in order to bring the total within the jurisdictional amount, there can be no question that under the uniform ruling of the United States Court it could not be permitted, but the sum claimed by each complainant to be involved is beyond the jurisdictional limit. To require them to bring separate actions would have no effect whatever except to make additional costs and labor. There is a rule which permits the joinder of parties, even when their claims are separate and distinct as to amount and individual right, but which depend upon the same law, the same procedure, and practically the same testimony for their determination. While there is not a concurrence of authority to this effect, there is such that it may be deemed a safe rule to follow when no injury can result from it to either party, but costs and labor may be saved. In this case no objection to this joinder has been pointed out except the merely technical one, that it is not the practice. It is therefore concluded that the complainants may be joined.

(2) That the statute of the State under which the defendant proceeded was not constitutionally enacted does not seem to be a question for consideration by this court, for the reason, if for no other, that it does not involve a federal question, nor is diversity of citizenship alleged.

(3) Whether the mode of assessing the cost of the sewer comes within the provisions of the 14th amendment as depriving a person of his property "without due process of law" does involve, for discussion at least, a federal question. It may safely be asserted that prior to the decision of Norwood vs. Baker, 172 U. S. 269, by the great weight of authority, both State and Federal, the assessment in this case would be justified, and even by some subsequent State cases it could be sustained. It is, however, a loss of time to consider prior United States or subsequent State rulings which are contrary to that decision, for it must govern the action of this Court. It is therefore important to try to understand just what it holds, and as the dissenting members of the Court charge that it is contrary to former rulings of the Court, care must be taken not to confuse what the court now says with what it may have held. The case was concerning the taking of a piece of ground for a street of which the value was fixed at two thousand dollars and the same paid to the owner. This, however, was a mere form, for this exact sum, together with all the costs of condemnation proceedings opening the street, etc., were assessed against the owner as the cost of opening the street, a fact that is emphasized by the court in repeating it. It was claimed, and so held by the Court, that this was in

violation of said amendment. The Court says: "That due process of law prescribed by that amendment requires compensation to be made, or secured to the owner, where private property is taken by a State or, under its authority, for public use." In answering the question whether the public in taking property for public use can "charge upon the abutting property the sum paid for it, together with entire cost incurred in condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street," says that special assessment may be made upon abutting property to meet the expenses of opening public highways; that such assessments are allowed upon the theory that special burdens may be imposed for special or peculiar benefits accruing; that the legislature has a large discretion in defining the territory benefited by the improvements and which may be subjected to such special assessments, but that the legislature cannot lay it down as an absolute rule that property, whether benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of improvement, and without any right in the property owner to show . . . . that the sum so fixed is in excess of the benefits received, and that such exaction of the cost in substantial excess of the special benefits accruing is a taking of property under the guise of taxation to the extent of such excess without compensation. The Court concluded that the assessment against the owner under a rule which excluded inquiry as to special benefits was, in so far as this assessment exceeded such special bene-

fits, a taking of private property for public use without compensation. As I understand the case, it holds that under the amendment private property cannot be taken for public use without compensation; that when the costs exacted against the property for public improvement exceeds the special benefits to the property of such improvement, it is a taking without compensation and in violation of the amendment; and also that the owner must have an opportunity to show, before a competent tribunal, the facts bearing upon these principles.

While there are a number of State decisions to the contrary, there are also other United States decisions of several Circuit Courts which follow this case. So far as observed none of them are concerning sewer improvements, but they seem to hold distinctly that any assessment made uniformly by lineal measurement without any consideration of the special benefit to each separate piece of property is obnoxious to the amendment in any case, and they so construe the Norwood case. I cannot say that that case so impresses me, when its facts are considered, and it would seem that there is reason left to apply a different rule to a case like this. In that case there was not only an actual taking of private property for public use and not only without any compensation, but costs for the taking were charged to the owner. Here, there is no taking of property, but a necessary improvement is put upon public land for the benefit and convenience of the owners of the abutting property, as well as for the health of the community. It was a necessary and unavoidable improvement; if we consider at

all the health and convenience of the people, its cost was assessed in the only equitable and just way that it can be.

How one lot can be benefited more than another by the building of a sewer is difficult to understand. In the sense that one may be more valuable than another it might be said that it is more benefited, but this is a doubtful way of estimating benefits.

The fact is apparent that a sewer is of like or the same use and benefit to each lot. It is true that a lot not improved or used for residence may not, for the present, receive the same benefit, but the lot as property has a like benefit, for the improvement is there and enhances its value, and makes it that much more valuable and salble for use as a residence or other occupation. Moreover, can it be allowed that an owner of city property, who does not choose to improve or use it, shall stand in the way of the improvement of his neighbors' property beyond him on the line of such improvement or can it be said that those who desire to use their property must pay not only the cost of its improvement, but also that of their neighbors who do not wish to improve their property, and thus get without cost the benefit of the improvement? While it seems to me that the reason and justice, in case of sewer improvement at least, is in favor of the rule followed by defendant in this case, I am inclined to the view that the other Courts have so construed the Norwood case as to include within its rule even the case of sewers and I am not inclined to put my judgment against theirs.

There is, however, another element in this case that contents me with the conclusion that I am constrained to reach. Complainants allege that "In the year 1895 sewers were built and construed by said city from 13th street to the east line of the said city along the alleys of each block respectively, running east and west between Washington street and Front street, and the whole cost of said sewerage is assessed upon the whole city of Boise City, and the bonds of said Boise City, issued therefor; that the complainants in this cause are obliged to pay their proportionate share of the taxes of said city for the construction of the last mentioned sewerage, and the whole of the costs of the sewerage in the sewer district" in which their property is situated. It may be a question whether the taking of property by due process of law does not involve an equality of taxation among those bearing it. It requires no discussion to reach the conclusion that these complainants in paying all the expense for the construction of the sewer to their property and their proportion with all the property owners of the city, for the original sewer system, are paying more than their just proportion of sewer taxes. In view, then, of the authorities the demurrer is overruled.

BEATTY,
Judge.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Opinion on demurrer. Filed March 12, 1901. A. L. Richardson, Clerk.

At a stated term of the Circuit Court of the United States for the Central Division of the District of Idaho, held at Boise, Idaho, on the 18th day of March, 1901. Present: Hon. JAS. H. BEATTY, Judge.

ROBERT B. WILSON et al.
vs.
BOISE CITY. } No. 183.

Order of Substitution.

On motion of A. A. Fraser, Esq., attorney for plaintiff, ordered that the names of Eveline O'Farrell, Teresa O'Farrell and Angeline O'Farrell be, and are hereby, substituted as parties plaintiff in lieu of John O'Farrell, deceased being the joint owners of the property of the said deceased plaintiff, John O'Farrell.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA G. O'FARRELL, ANGELINE O'FARRELL, and R. E. EMMERSON,

Plaintiffs,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Defendant.

Answer.

To the Judges of the United States Circuit Court, for the District of Idaho, Central Division:

The defendant, Boise City, a municipal corporation of the State of Idaho now and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, or imperfections in said bill contained, for answer thereto, or so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

I.

This defendant admits the allegations contained in paragraph 1 and 2 of said bill.

II.

This defendant admits the allegations contained in paragraph 3 of said bill, but alleges further, in addition to said subdivision twenty-seven of section two of said act, referred to in said paragraph 3 the following provisions of said act:

Twenty-seventh.—To open and establish streets, avenues, lanes, and alleys and widen the same, and for that purpose to condemn property for the city use under such regulations as are or may be provided by law. To grade, pave, plank, macadamize, gravel, curb, or otherwise improve or repair or beautify the highways, streets, avenues, lanes, alleys, and sidewalks of the city; and to provide for the payment of the expenses thereof, to levy special assessments upon property that is contiguous to or abutting or fronting upon the highway, street, avenue, lane, alley or sidewalk to be graded, paved, planked, graveled, curbed, macadamized, or otherwise improved or beautified by said ordinances as in the opinion of the city council shall secure a just and equitable apportionment of said assessment among the lots or parcels of said contiguous, abutting or fronting property. Special assessments so levied shall constitute a lien upon the property assessed, and the payment thereof may be enforced as all payments of taxes on real estate are enforced in said city.

III.

This defendant admits the allegations contained in paragraphs 4, 5 and 6 of said bill.

IV.

This defendant admits that on the 4th day of November, 1898, at a meeting of the common council of Boise City, ordinance number 266 was passed by the said common council and approved by the mayor of said Boise City, which ordinance provides, in addition to the provisions of said ordinance pleaded in paragraph 7 of said bill, the following provision:

Whereas, after notice inviting proposals and bids for the laying and constructing of said sewers ordered by said ordinances numbers 249 and 250, had been duly published in the "Idaho Daily Statesman," proposals and bids were received by the said council, and a contract for said laying and constructing of said sewers was awarded to H. B. Eastman, his bid being the lowest and best; and,

Whereas, after the total cost and expense of said laying and constructing of said sewers had been estimated and determined, the common council, pursuant to the provisions of said ordinances number 249 and 250, caused notice of the intention of the common council to levy a local or special assessment upon and against all the property fronting or abutting upon or contiguous to that portion of sewer districts number one and two above described to be daily published, the said notice also specifying a time and place when and where the common council would meet to receive and hear and determine any and all objections or complaints against said assessment, or the levy thereof, any owner of any said property might have to make; and,

Whereas, said meeting was duly held pursuant to said notice, at eight o'clock P. M. on the 15th day of June, 1898, at the city hall, at which time all complaints and objections to said assessment and the levy thereof that were presented were heard, and after due consideration by the common council, determined to be insufficient and invalid, and were therefore overruled.

V.

This defendant denies that said ordinance number 266, pleaded in paragraph 7 of said bill, provides that the respective amounts of said assessment, chargeable against each lot, piece, or parcel of said property owned by said complainants are the amounts pleaded in said paragraph 7 of said bill, but allege that said ordinance number 266 provides the following amounts of said assessment chargeable against said complainant's property, which are the only amounts so assessed against said complainant's property by said ordinance or any other ordinance of said city for the payment of the costs of said sewer:

Lots 1 to 11, inclusive, block 104.....$365.29
Lots 1, 2, 7 and 8, block 96.....$125.96
Lots 5, 6, 10, 11 and 2, block 97.....$157.45
Lots 1 to 12, inclusive, block 99.....$377.89
Lots 1, 2, 3, 4 and north fraction of block 128....$239.33
Lots 11 and 12, block 100.....$ 62.98

VI.

This defendant denies that there are no means pointed out or provided for by which assessments can be made against the lots or blocks mentioned in the said bill of

complaint according to the benefits conferred on each, in the act of the legislature or the city charter or the ordinances thereunder, but alleges the fact to be that said act of the legislature and the city charter of Boise City and the ordinances thereunder have full and adequate provisions, by means of which assessments can be and are made according to benefits conferred on each lot or block as hereinbefore and hereafter set forth; that said mayor and common council of defendant did, prior to the making and levying of said sewer assessments, ascertain and determine the benefits conferred on each distinctive lot or block of the property situated in said sewer districts number two and three and found and decided that each lot or block of property situated in said sewerdistricts and the owners thereof would be benefited to the full amount of said assessment so levied against said property of said complainants and other property owners situated in said sewer districts; that each of said lots or blocks of property and the owners thereof within said sewer districts number two and three were and are benefited to the full amount of said assessments so levied as aforesaid, by reason of the construction of said sewer.

VII.

This defendant denies that said sewer assessment mentioned and referred to in paragraph eight of said bill is and was arbitrary, or has no reference whatever either to the value of the lots upon which the said assessment is made or the benefits conferred upon said lots or the damage, if any, resulting from the building of said

sewer, but alleges the fact to be that said sewer assessment was levied in a just and equitable manner and according to the benefits conferred upon said property against each lot and block of property situated in said sewer districts number two and three, and according to the benefits each owner of said property would receive by reason of the construction of said sewer.

VIII.

This defendant denies the allegations contained in paragraph 9 of said bill, but alleges the fact to be that in the years 1891-92 said defendant did construct a main sewer on Thirteenth street, in said Boise City, and in which said sewer of said sewer districts number two and three runs into and which carries away and out of said city the filth, refuses, and sewerage from the homes and property of said complainants and other property owners in said districts number two and three; that the cost of the construction of said main sewer on said Thirteenth street was defrayed by the issuance of city bonds of said Boise City.

IX.

This defendant admits the allegations contained in paragraphs 10 and 11 of said bill.

X.

This defendant admits that the property of each of the complainants described in said bill exceeds in value the sum of two thousand dollars, exclusive of interest and costs, but further alleges that said property of said complainants did, at the time of the levying of said assess-

ment and at the present time, exceed in value the following sums to wit:

Lots 1 to 11, inclusive, in block 104.....$6,000.00
Lots 1, 2, 7, and 8, in block 96, and improvements thereon.....$5,000.00
Lots 5, 6, 10, 11, 12, block 97, lots 1 to 12, inclusive, in block 97, and lots 11 and 12, in block 100, and the whole of the fractional block number 138, containing one acre....$10,000.00

XI.

This defendant admits the allegations contained in paragraph 13 of said bill, and that sections five and six of chapter XI of the Ordinances of Boise City as pleaded in paragraph 12 of said bill.

XII.

This defendant denies the allegations contained in paragraphs 14 and 15 of said bill.

XIII.

This defendant has no information or belief sufficient to enable it to answer the allegations contained in paragraph 16 of said bill and it therefor denies the same.

XIV.

This defendant denies the allegations contained in paragraph 17 of said bill, but alleges further that the defendant was at the time of making said assessments, and now is, possessed with authority and right to build, lay, and construct sewers in said Boise City in the manner aforesaid, under and by virtue of the provisions of

section 2 of article XII of the constitution of the State of Idaho, which said section contains two provisions, that any county or incorporated city or town may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with its charter or with the general laws; that under and by virtue of the provisions of subdivision seven of section 5 of the charter of said Boise City authority is also granted to the defendant to make regulations to prevent the introduction of contagious diseases in the city and to remove persons inflicted with said diseases therefrom to suitable hospitals, provided by the city for that purpose, and to secure the protection of persons and property therein, and to provide for the health, cleanliness, ornament, peace, and good order of the city; that the defendant now is, and was at the time of making said assessments, possessed with authority under and by virtue of the police power and regulations of said city to build and construct, in the manner aforesaid, sewers in said city wherever necessary for the protection of the health of the inhabitants of said city; that at the time of the construction of said sewer in said sewer districts number two and three it became and was necessary for the defendant to build said sewer, in order to protect the health of the citizens residing in said sewer districts two and three in said city.

XV.

This defendant denies the allegations contained in paragraph 18 of said bill, but alleges the fact to be that prior to the levying of said sewer assessment mentioned

in said bill proceedings were had by the mayor and common council of the defendant, in which a hearing and opportunity to be heard was given to said complainants, and each of them, and all property owners in said sewer districts number two and three, and an adjudication was had as to the benefits accruing to each lot or block of property situate within said sewer district number two and three, by reason of the construction of said sewer system. That due and legal notice of said proceedings and hearing was given to all of said complainants and all the property owners in said sewer districts number two and three, that the mayor and common council of the defendant would hold a meeting of said mayor and council, for the express purpose of receiving and hearing any and all objections that any of said property owners in said sewer districts number two and three might have or present; that said meeting was duly held and a hearing given to all of said property owners in said sewer district number two and three before said assessment was levied by said mayor and council, in the council chambers, at the city hall of said defendant; that none of said complainants appeared, nor filed any objections or reasons why said sewer assessment should not be levied against their property nor the laying and constructing of said sewer in said sewer districts; that prior to the construction of said sewer a petition, signed by more than a majority of the resident property owners in said sewer districts number two and three, was duly filed with said mayor and council of the defendant; that shortly after the filing of said petition, and before the

levying of said assessment, said mayor and council of the defendant did refer said petition to the city engineer of said city to investigate the sufficiency of said petition; that said city engineer duly reported to said mayor and council, in which report he stated that said petition contained more than a majority of the resident property owners in said sewer districts number two and three, and that said report of the said city engineer was duly accepted by said mayor and council.

XVI.

This defendant denies the allegations contained in paragraph 19 of said bill.

XVII.

This defendant admits that no part of said complainant's property described in said bill has been redeemed from said tax sale.

XVIII.

That as to whether said tax sale and the proceedings set forth in said bill constitute a cloud upon the title to said property of complainants this defendant has not sufficient information or belief to enable it to answer, and therefore denies the same.

XIX.

And further answering, this defendant alleges that said sewer districts number two and three and all of the property of said complainants described in said bill is situated within the central part of the residences of said city, and that the homes of said complainants are upon

said property, and that each of said complainants does now, and did at the time of the construction of said sewer, live on said property; that shortly after the construction of said sewers in said sewer districts number two and three said complainants, and each of them, did, voluntarily, and of their own free wills, accept said sewer, by connecting their homes to the same, and have ever since used and received the benefit of said sewer; that the only persons who use said sewer in said sewer districts number two and three are said complainants and other property owners, situated in said districts; that it became necessary, in the interest and protection of the health of the inhabitants residing in said sewer districts number two and three and the city at large, to construct said sewer in said districts number two and three; that by reason of the construction of the said sewer in said sewer districts number two and three said sewer is a benefit to said property of said complainants and to the complainants more than the amount assessed against said property for the payment of the same; that said sewer has enhanced the valuation of each lot and block of complainants.

XX.

And further answering, this defendant denies that the complainants, or either of them, was ever entitled to the relief, or any part thereof, as in said bill demanded; nor has complainants, or either of them, any right to any other answer to said bill or any part thereof, from this defendant than as above given; and this defendant prays the same advantage of defendant's aforesaid answer as

if it had pleaded or demurred to the said bill of complaint.

And this defendant denies all the said bill charges; that there is no other matter, cause, or thing in the said bill contained material or necessary for this defendant to make answer thereunto, or not herein and hereby well and sufficiently answered, traversed, awarded, or denied, is not true to the knowledge or belief of this defendant; and all of which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court may direct.

And this defendant humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf sustained.

BOISE CITY,
A Municipal Corporation of the State of Idaho.
By J. H. RICHARDS,
Mayor of the Defendant, Boise City.

C. C. CAVANAH,
Solicitor and of Council for Defendant, Boise City.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Answer. Filed March 26th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Central Division of the District of Idaho.

ROBT. B. WILSON, EVELINE O'FERRELL, TERESA O'FERRELL, ANGELINE O'FERRELL, and R. E. EMMERSON,

Plaintiffs,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Defendant.

Replication.

These replicants, Robt. B. Wilson, Eveline O'Ferrell, Teresa O'Ferrell, Angeline O'Ferrell, and R. E. Emmerson, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors and uncertainties and insufficiencies of the answer of the defendant, Boise City, for replication thereunto saith that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by these replicants; without that that any other matter or thing in said answer contained, material or effectual in law to be replied unto and not herein and

herebefore well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by his said bill they *hath* already prayed.

ALFRED A. FRASER,
Solicitor for Complainants.

[Endorsed]: No. 183. In the Circuit Court of the United States, Central Division, District of Idaho. Robert B. Wilson et al., Plaintiffs, vs. Boise City, Defendant. Replication. Filed April 6th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA G. O'FARRELL, ANGELINE O'FARRELL, and R. E. EMMERSON,
Plaintiffs,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho.
Defendant.

Agreed Statement of Facts.

The above-named parties hereby agree upon the following statement of facts, in addition to the facts admitted

by the pleadings, and submit the same to the Court for determination of the points in controversy hereinafter specified:

The facts agreed upon are as follows:

I.

That on the 4th day of November, 1898, the common council and mayor of Boise City, Idaho, duly passed and approved the following ordinance, being the same pleaded in paragraph four of defendant's answer herein:

Assessments for Sewer District Nos. 2 and 3.

Sec. 26. Whereas, the common council, by ordinances numbered 249, approved March 29, 1898, and 250, approved March 29, 1898, did order that a sewer be laid and constructed in sewer district number two, which embraces all that part of said city lying between Hays and Franklin streets, commencing at the sewer main situate on Thirteenth street, running thence easterly to the east boundary line of said city, and also in sewer district number three, which embraces all that part of said city lying between Franklin and Washington streets, commencing at the sewer main situate on Thirteenth street in said city, running thence to the east boundary line of said city, in Boise City, Idaho; and,

Whereas, after notice inviting proposals and bids for the laying and constructing of said sewers ordered by said ordinances numbered 249 and 250, approved the 29th day of March, 1898, had been duly published in the "Idaho Daily Statesman," proposals and bids were received by said council, and a contract for said laying and

constructing of said sewers was awarded to H. B. Eastman, his bid being the lowest and best; and,

Whereas, pursuant to said award, a contract for said laying and constructing said sewers was made and executed on the 7th day of July, 1898, by and between Boise City and said H. B. Eastman, by the terms of which, said contract, the cost of said laying and constructing of said sewer was fixed at $94\frac{3}{4}$ cents per linear foot; and

Whereas, after the total cost and expense of such laying and constructing of said sewers had been estimated and determined, the common council, pursuant to the provisions of said ordinances numbered 249 and 250, approved the 29th day of March, 1898, caused notice of the intention of the common council to levy a local or special assessment upon and against all the property fronting or abutting upon or contiguous to that portion of sewer districts numbered two and three, above described, to be duly published, the said notice also specifying a time and place when and where the common council would meet to receive and hear and determine any and all objections or complaints against said assessments, or the levy thereof, any owner of any of said property might have to make; and,

Whereas, said meeting was duly held pursuant to said notice at 8 o'clock P. M. on the 15th day of June, 1898, at the city hall, at which meeting all complaints and objections to said assessments and levy thereof that were presented were heard, and after due consideration by the common council determined to be insufficient and invalid, and were therefore overruled.

Now, therefore, the mayor and common council of Boise City, Idaho, do ordain:

Cost of Laying Sewers, How Paid.

Sec. 27. That for the purpose of defraying the cost of laying and constructing sewers in sewer districts numbered two and three, as provided in ordinances numbered 249 and 250, approved March 29th, 1898, and in accordance with other ordinances of Boise City, relative to the laying and constructing of sewers from the sewer main, situate on Thirteenth street, and extending to the east boundary line of said city lying between Hays and Franklin streets in said city; also from the sewer main situate on Thirteenth street, and extending to the east boundary line of said city, lying between Franklin and Washington streets, in Boise City, Idaho, there is hereby levied upon and against all property fronting or abutting upon or contiguous to that portion of sewer districts numbered two and three above described, including intersections of streets, constructing manholes, flushing tanks, foot-vents, making connections with water supply for flushing, and defraying the expense of the city engineer in giving grades, etc., a local or special assessment of 62.82 cents per linear foot for each linear foot of property represented in said districts.

The respective amounts of said assessment chargeable against each lot, piece, or parcel of said property, being as follows, to wit, according to the official plat of Boise City, Idaho:

Sewer Assessment-Roll, Sewer District No. 2.

Description of property, amount assessment sewer, reputed owner.

Block 73, $377.89, Eoff & Regan.

Lots 1 and 2, block 76, $62.98, Mrs. H. William.

Lot 3, block 76, $31.50, Wm. T. Sanders.

Lot 4, block 76, $31.50, I. M. Moore.

Lots 5, 6, block 76, $62.98, J. M. Haines.

Lots 7, 8, 9, block 76, $94.47, Sherman G. King.

Lot 10, block 76, $31.50, Wm. Stark.

Lots 11, 12, block 76, $62.98, Isaac Bloch.

Lots 1, 2, 3, block 81, $94.47, Mrs. J. H. Bush.

Lots 4, 5, 6, block 81, $94.47, J. M. Johnson.

Lot 7, block 81, $31.50, Mrs. Flora Simons.

Lot 8, block 81, $31.50, S. H. Cox.

Lot 9, block 81, $31.50, E. E. Myers.

W. 26 feet lot 10, block 81, $16.37, Dr. Failchild.

E. 24 feet lots 11, 12, block 81, $78.09, M. C. McCrum.

Lot 1, block 84, $31.50, M. A. Regan.

Lot 2, block 84, $31.50, Dr. Chas. Crane.

Lot 3, block 84, $31.50, F. R. Brunsell.

Lots 4, 5, 6, block 84, $94.47, Mrs. W. S. Paxton.

Lot 7, W. ½ lot 8, block 84, $47.23, Mrs. M. A. Puckett.

E. ½ lot 8 and W. 12.5 feet, lot 9, block 84, $23.62, Mrs. Gussie Cohn.

E. ¾ lot 9, block 84, $23.62, Fannie Stolz.

Lots *Lo*, 11, 12, block 84, $94.47, Mrs. M. A. Puckett.

Lot 1, block 89, $31.50, Sam Harding.

Lots 2, 3, block 89, $62.98, Jno. Suhlsen.

Lots 4, 5, 6, blocks 89, $94.47, Mrs. Lucinda Turner.

Lots 7, 8, 9, block 89, Pat Gerrigan.

Lots 10, 11, 12, block 89, $94.47, Fred Granholm.

Lots 1, 2, 7, 9, 10, 11, 12, block 92, $251.93, Mrs. William Jauman.

Lot 3, block 92, $31.50, J. R. Lusk.

Lot 4, block 92, $31.50, Mrs. C. Nye.

Lots 5, 6, block 92, $62.98, C. J. Ornsbee.

Lot 1, block 97, $31.50, Thos. Finnigan.

Lot 2, block 97, $31.50, Mrs. E. Miller.

Lots 3, 4, block 97, $62.98, S. H. Hays.

Lots 5, 6, 10, 11, 12, block 97, $157.45, J. A. O'Farrell.

Lots 7, 8, 9, block 97, $94.47, Wm. Myers.

Lots 1 to 12, inclusive, block 99, $377.89, J. A. O'Farrell.

Lots 1, 2, 3, 4, and N. fraction block 138, $239.33, J. A. O'Farrell.

Sewer District No. 3.

Lots 1 to 12, inclusive, block 72, $377.89, Jno. Lemp.

Lot 1, block 77, $31.50, Mrs. F. A. Heron.

Lot 2, block 77, $31.50, Frank Martin.

Lot 3, block 77, $31.50, G. A. Brown.

Lot 4, block 77, $31.50, M. Reynolds.

Lots 5, 6, block 77, $62.98, Ed. Brannon.

Lots 7, 8, block 77, $62.98, Jno. McMillan.

Lot 9, block 77, $31.50, S. B. Coulter.

Lot 10, block 77, $31.50, Geo. Lewis.

W. 36 feet lot 11, block 77, $22.67, W. E. Pierce.

E. 14 feet lot 11 and lot 12, block 77, $40.31, W. E. Borah.

Lots 1 to 12, inclusive, block 80, $377.89, Wm. Wilson.

Lots 1, 2, block 85, $62.98, T. W. Randall.

Lot 3, block 85, $31.50, Mrs. Irma Griffin.

Lot 4, block 85, $31.50, Mrs. Jesse McDowell.

Lots 5, 6, block 85, $62.98, Emily Hull.

Lots 7, 8, block 85, $62.98, Pat Sheridan.

Lots 9 to 12 inclusive, block 85, $125.96, Wm. Wilson.

Lot 1, block 88, $31.50, Catholic Church.

Lot 2, block 88, $31.50, Mrs. F. Dargel.

Lots 3, 4, block 88, $62.98, Geo. Wise.

Lots 5, 6, block 88, $62.98, J. W. Plummer.

Lots 7, 8, block 88, $62.98, G. D. Golden.

Lot 9, block 88, $31.50, Mrs. Julia Smith.

Lots 10, 11, 12, block 88, $94.47, Addie Chapman.

Lots 1 to 12, inclusive, block 93, $377.89, Mrs. M. Barnwell.

Lots 1, 2, 7, 8, block 96, $125.96, R. E. Emerson.

Lot 3, block 96, $31.50, R. Adelman.

Lot 4, block 96, $31.50, Mrs. E. H. Hesse.

Lot 5, block 96, $31.50, Mrs. Rachel Peterson.

Lot 6, block 96, $31.50, Theo. Buckle.

Lots 9, 10, block 96, $62.96, W. F. Ryals.

Lots 11, 12, block 96, $62.98, J. B. Broadbent.

Lots 1, 2, block 100, $62.98, P. A. Quirk.

Lots 3, 4, block 100, $62.98, D. Quimby.

Lots 5, 6, block 100, $62.98, Mrs. Annie Ish.

Lots 7, 8, 9, block 100, $94.47, Mrs. Jno. Green.

Lot 10, block 100, $31.50, Mrs. E. Bayhouse.

Lots 11, 12, block 100, $62.98, J. A. O'Farrell.

Lot 1 and W. ½ lot 2, block 103, $47.23, J. B. Morrow.

E. ½ lot 2 and lot 3, block 103, $47.23, R. F. Cook.

Lots 4, 5, 6, block 103, $94.47, F. Fletcher.

Lots 7, 8, 9, block 103, $94.47, E. W. Hall.

Lots 10, 11, 12, block 103, $94.47, G. M. Parsons.

Lots 1 to 11, inclusive, block 104, $365.29, R. Wilson.

Approved November 4, 1898.

Assessments, When Due.

Sec. 28. The assessment levied by section 27 of this chapter shall be due and payable by the owners of said property to the city tax collector on the 1st day of December, 1898, and if not paid by or before the 1st day of December, 1898, shall on said 1st day of December, 1898, be and become delinquent.

Approved November 4, 1898.

Penalty Added.

Sec. 29. A penalty of 15 per cent on all delinquent assessments must be added for delinquency, and must be collected when said delinquent assessments are collected, together with costs of collection.

Approved November 4, 1898.

Tax Collector to Make Delinquent List.

Sec. 30. Within ten days after said 1st day of December, 1898, the city tax collector shall make a list of all property on which said assessments are delinquent, showing the particular tracts and the names of the owners or reputed owners, and shall immediately cause said list to be published for ten days in Boise City. At the expiration of such publication all property on which said assessments are not then paid shall be sold by the

city tax collector at the city hall to satisfy said assessments and penalty and costs.

Notice of such sale shall be given for and during the time the delinquent list is published and in connection therewith. Such sale shall be conducted in the same manner, and shall have the same effect as sales of property for delinquent taxes, and the ordinances of Boise City relative to sales for delinquent taxes, so far as they may be applicable, shall govern the issuance of certificates of sale, the right of redemption, the issuance of deeds, and other matters connected with sales of property under this ordinance.

Approved November 4, 1898.

Assessments to be Paid in Lawful Money.

Sec. 31. The assessments levied as hereinbefore provided shall be paid in lawful money of the United States of America.

Approved November 4, 1898.

Fund Created in City Treasury.

Sec. 32. There is hereby created and established in the city treasury a fund to be known as the "Second and Third Districts Sewer Fund." All moneys collected on account of the assessments by this ordinance levied shall be paid into the city treasury to the credit of said fund, and shall be paid out only on warrants drawn against said fund in favor of contractors and others for work done in laying and constructing said sewer along that portion of sewer district above described. Such war-

rants shall draw interest at date of issuance at the rate of 8 per cent per annum until called for payment.

Approved November 4, 1898.

Assessments Declared to be a Lien.

Sec. 33. The assessments levied by this ordinance are hereby declared to be a lien against the property upon and against which they are levied from the passage and approval of this ordinance until assessments are wholly paid and satisfied.

Approved November 4, 1898.

That the respective amounts of said assessment chargeable against each lot, block, and parcel of complainant's property provided for in said ordinance number 266 are as follows:

Lots 1 to 11, inclusive, block 104.....$365.29
Lots 1, 2, 7, and 8 block 96.....$125.96
Lots 5, 6, 10, and 2, block 97.....$157.45
Lots 1 to 12, inclusive, block 99.....$377.89
Lots 1, 2, 3, 4, and fraction of block 128.....$239.33
Lots 11 and 12, block 100.....$ 62.98

II.

That the ex-Mayor Alexander, and nine persons who were members of the common council of Boise City during the year when said sewer assessment was levied, will testify to the following facts:

That prior to the time said sewer was constructed and the levying of said assessment for the purpose recited in said Ordinance Number 266, they did make, as such mayor and council, for the purpose of ascertaining the

necessity of and benefit said sewer would be to each description of property in said sewer districts number two and three, an examination of the extent and amount of benefit said sewer would be to each description of said property in said sewer districts number two and three, an examination of the extent and amount of benefit said sewer would be to each description of said property by going upon said property in said districts, and found and decided that it was necessary in the protection of the health of the citizens of said city and would be a benefit to each description of said property to the full amount of said assessment so levied against each of said properties by reason of the construction of said sewer. That said mayor and council did, prior to the levying of said assessment, order and cause to be given by publication in the "Idaho Daily Statesman," a newspaper published in said city, a notice to all of said property owners in said sewer districts number two and three, for a period of ten days, of the intention of said mayor and council to levy at a meeting of said mayor and council a special assessment against all property situated in said districts to pay the cost and expense of the construction of said sewer; that said notice was duly published in said newspaper once each day for ten days; that the following is a true copy of said notice:

NOTICE.

Notice is hereby given that the common council of Boise City, Idaho, has fixed June 15, 1898, at 8 o'clock P. M. in the city hall, as the time and place, to hear any

and all objections to the levying of a special assessment to defray the cost and expenses of laying and constructing a sewer in sewer districts numbers two and three in Boise City, Idaho.

DEAN PERKINS,
City Clerk.

That said meeting, as specified in the aforesaid notice, was duly held by said mayor and council, and at said meeting a hearing was granted to all property owners owning property in said districts two and three to file or present any reason or objections why said sewer should not be constructed; that none of said complainants either appeared, filed, or presented in any way any objection or reason why said sewer should not be constructed or said assessment be levied against their property at said meeting mentioned in the aforesaid notice; that said complainants R. E. Emerson, Eveline O'Farrell, Teresa O'Farrell, Angeline O'Farrell, and Robert Wilson all had knowledge of said meeting prior to the time the same was held, by conversation with M. Alexander, who was mayor at that time. That at said meeting and prior to the time said Ordinance Number 266 was passed reports from the city engineer and a special committee, which had been duly appointed by said mayor and council prior thereto to examine into the necessity of and the benefit said sewer would be to said properties in said districts two and three, were received and accepted by said mayor and council, and in said reports it was stated that after an examination was made

it was in the opinion of said city engineer and special committee that it was necessary in the protection of the health of all persons residing in said districts two and three and city, and that it would be a benefit to each description of property in said districts to construct said sewer; that at said meeting and before the passage of said Ordinance Number 266 the said mayor and council did discuss, consider fully, and determine the necessity of and the benefit said sewer would be to each description of property in said districts; that at the time said assessment was levied said mayor and council considered and determined that all of the property in said districts, and each of said lots, blocks, and parcels of said property, would receive a benefit greater than the amount of said assessment by reason of the construction of said sewer. That notice for proposals for bids was duly published in a daily newspaper in said city for a period of twelve days prior to the levy of said assessment, and proposals were received and opened by said mayor and council at a meeting, and that the bid of Eastman Brothers was accepted by said mayor and council as the same was the lowest and best.

III.

That Jerry Jones, Edward Phelps, and James Lusk, all competent plumbers in Boise City, any who have had considerable experience in constructing sewers in said city, will testify that the cost of the construction of said sewer at the amount stated in said Ordinance Number 266 was at the time of said levy and is a reasonable and

low cost, and that the same could not have been constructed at a lower cost unless at a loss to the person constructing the said sewer.

IV.

That said sewer districts two and three are situated in the thickly settled part of the residence of said Boise City, and that the homes where said complainants have been during the past ten years are upon their said properties against which said assessment was levied, excepting complainant Robert Wilson, who resides in another part of the city, but there are houses upon his said property occupied by his tenants. That prior to the construction of said sewer each of said complainants and other persons residing in said districts used privies and cesspools upon their said properties in said districts without sewerage facilities.

V.

That the city physician, Dr. George Collister, Dr. Sweet, Dr. McCalla, and Dr. Plummer, who are all reputable physicians practicing in Boise City, will testify that the maintenance of privies and cesspools in Boise City are injurious to the health of the citizens of said city, and does to a great extent cause sickness in said city; that the construction of said sewer in said districts two and three is a benefit and protection to the health of all persons residing in said districts and city; that in the third ward of said city, where there is no sewer system and where privies and cesspools are used entirely, there is more sickness than in any other part of

the city, which is caused to a great extent by reason of there being no sewer system in said ward.

VI.

That the valuation of the property of complainants described in said bill is as follows, to wit:

Lots 1 to 11, inclusive, block 104.....$6,000.00
Lots 1, 2, 7, and 8, block 96.....$5,000.00
Lots 5, 6, 10, 11, 12, block 97, and lots 1 and 12, inclusive, of block 97; and lots 11 and 12, block 100; and the whole of fractional block 138 containing one acre.....$10,000.00

That the aforesaid valuations includes improvements upon said properties. That by reason of the construction of said sewer in said districts two and three the values of said properties in said districts have been enhanced, and that the healthfulness of said districts have been increased.

VII.

That prior to the construction of said sewer in said districts two and three a petition asking said city to order the construction of the same was duly signed and filed with the mayor and council of said city by more than a majority of the resident property owners in said districts, and that said petition was duly accepted by said mayor and council.

VIII.

That all of the property owners except complainants in said districts two and three have paid to said city the amounts of said assessment so levied against their prop-

erty. That shortly after the completion of said sewer said complainants and all property owners in said districts did without any notice or demand on the part of said defendant connect their homes and houses occupied by their tenants and their said property to said sewer, and have each used ever since the time of so connecting therewith, and do at this time use said sewer; that said sewer in said districts two and three was constructed in a good and workmanlike manner, and that the same connects with the general sewer of said city, and is ample in capacity to meet all sewerage requirements of said districts; that the only property and persons who use said sewer are those situated in said districts. That the following ordinance is in force in Boise City:

Owners to Have Closets in Buildings.

Sec. 3. The owner or occupant of any building on the line of, or within one hundred and seventy feet of, any sewer main, any portion of which building is used for any purpose during any portion of the day, shall have at least one watercloset connected with the public sewer, or shall provide such watercloset within thirty days after notification from the city engineer or to the chief of police so to do, and shall have such waterclosets suitably arranged for use as a urinal, or provide a separate urinal connection with the sewers, and the owner or occupant of any such building in which food is cooked or clothing washed shall have a suitable sink, slopstone, or hopper for the reception of waste water, unless the watercloset

is the kind suitable for such use, in which case it can be so used.

Approved February 18, 1892.

Penalty.

Sec. 19. Every person who knowingly omits or refuses to comply with or willfully violates any of the provisions of this article, shall be fined for each offense in any sum not less than one nor more than fifty dollars, and costs of prosecution.

Approved February 18, 1892.

That the said statement of facts and the pleadings in this case contain all of the ordinances, actions, and steps taken by the mayor and council of Boise City when in constructing and ordering to be laid said sewer.

Dated at Boise City, Idaho, this 6th day of April, 1901.

ALFRED A. FRASER,
Solicitor for Complainants.
C. C. CAVANAH,
Solicitor for Defendant.

[Endorsed]: No. 183. United States Circuit Court, District of Idaho. Robert B. Wilson et al., vs. Boise City. Stipulation of Facts. Filed April 6th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho.

ROBERT B. WILSON et al.,
Complainants,
vs.
BOISE CITY,
Defendant.

Opinion.

A. A. Fraser, for Complainants.

C. C. Cavanah, for Defendant.

Upon submission of this cause by a stipulation of the facts, the questions presented upon and settled by the demurrer to the complaint were again argued and some additional authorities presented. While I have carefully examined them, it is unnecessary to now review or attempt to point out the particulars of their applicability or their inapplicability, for the one plain fact cannot be denied that the assessment was made by the lineal foot fronting the sewer line without particular consideration or hearing as to the special benefits resulting to the different property owners. The decided weight of the authority which I feel bound to follow holds this is in violation of the constitution of the United States as amended. While still doubting that such a case as this should be concluded by that of Norwood vs. Baker, 172 U. S. 269, yet in pursuance of what seems a general view of the Courts the judgment must be and is ordered in favor of complainants.

Perhaps reference should be made to the contention of defendant's counsel, that the amount of the assessment

in case of each complainant is not sufficient to give the Court jurisdiction. If this were the "matter in dispute," the case would long since have been promptly dismissed as not within the jurisdiction of the Court, but the "Matter in dispute" is the value of the complainant's property, which is alleged for each to be over the jurisdictional amount.

April 19, 1901.

BEATTY,
Judge.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Opinion. Filed April 19th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Central Division of the District of Idaho.

ROBERT B. WILSON, EVELINE O'FERRELL, TERESA O'FERRELL, ANGELINE O'FERRELL, and R. E. EMERSON,
Complainants,
vs.
BOISE CITY, a Municipal Corporation of the State of Idaho,
Defendant.

Decree of the Court.

This cause coming on regularly to be heard before the Court on the 6th day of April, 1901, Alfred A. Fraser

appearing as counsel for the complainants and C. C. Cavanah appearing as counsel for the defendant, and the Court, after having heard the evidence and argument of respective counsel herein, and after duly considering the same: It is now, therefore, hereby ordered, adjudged, and decreed that the complainants have judgment as prayed for in their complaint herein against the said defendant; that all adverse claims of the defendant and all persons claiming or to claim said premises or any part thereof through or under said defendant are hereby adjudged and decreed to be invalid and groundless, and that the complainants be and are hereby declared and adjudged to be the true and lawful owners of the several lots, blocks, and tracts of land described in the complaint and hereinafter described, and every part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims and demands or pretensions of the defendant.

Said premises are bounded and described as follows, to wit: That said Robert B. Wilson is the owner of lots numbered one to eleven, inclusive, in block No. 104, of the original townsite of Boise City, Idaho, and that his title to the same is hereby quieted as in this decree set forth; that R. E. Emmerson is the owner of lots numbered one, two, seven, and eight, in block No. 96, of the original townsite of Boise City, Idaho, and that his title to the same be quieted as in this decree set forth; that Eveline O'Ferrell, Teresa G. O'Ferrell, and Angeline O'Ferrell are the owners of lots numbered five, six, ten, eleven, and twelve, in block No. 97, and of lots numbered

one to twelve, inclusive, in block No. 99, and of lots numbered eleven and twelve, in block No. 100, and the whole of the fractional block No. 138, containing about one acre of ground; that the whole of said lots, blocks, and parcels of land are situate within the original townsite of Boise City, Idaho, in the county of Ada and State of Idaho.

And it is hereby adjudged and decreed that the tax certificates of sale issued on the 21st day of June, 1899, to the said defendant, Boise City, by Mrs. Carrie E. Myers, and city tax collector, against the property of each of these complainants as herein described are each of them void, and of no legal force or effect.

And the said defendant is hereby perpetually estopped from setting up any claims to the property of the complainants described herein, or any part thereof, by reason of said tax certificates of sale or any deed which said city may have acquired under and by virtue of said tax certificates of sale or the proceedings upon which said certificates of sale were based or issued.

And it is hereby further ordered, adjudged, and decreed that the complainants do have and recover their costs herein against the said defendant.

Dated April 19th, 1901.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robt. B. Wilson et al. vs. Boise City. Decree. Filed April 19th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Central Division of the State of Idaho.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA O'FARRELL, ANGELINE O'FARRELL and R. E. EMERSON,

Complainants,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho.

Defendant.

Petition for Allowance of Appeal and Assignment of Errors.

To the Honorable JAMES H. BEATTY, Presiding Judge of the Circuit Court, aforesaid:

The above-named defendant, Boise City, a municipal corporation of the State of Idaho, named in the decree entered in this cause on the 19th day of April, 1901, deeming itself aggrieved by the decision and decree aforesaid in the above-entitled action, does attach hereto and make a part hereof its assignment of errors, and prays for the allowance of an appeal from said decree to the United States Circuit Court of Appeals, in and for the Ninth Judicial District of the United States, and that a transcript of the record and proceedings herein upon which said decree was rendered may be sent, duly authenticated to said Court of Appeals, and also that an

order be made fixing the amount of security which defendant shall give and furnish upon such appeal.

Assignment of Errors.

Comes now the petitioner above named, Boise City, a municipal corporation of the State of Idaho, and by its solicitor and counsel herein, and particularly specifies the following as the errors upon which said defendant will rely, and which it will urge upon its appeal in the above entitled cause:

First.—The Court erred in holding and deciding that the complaint herein does state facts sufficient to constitute a cause of action; and in overruling defendant's demurrer to said complaint for the following reasons, to wit:

(a) Because the Court had no jurisdiction to hear and determine the matters stated in said complaint.

(b) Because complaint is multifarious, as it appears therefrom that said complainants are not in any manner in common or jointly interested or concerned and are different owners of distinct and separate pieces and parcels of real property.

(c) Because there is a misjoinder of parties complainants, as it appears from said complaint that there is no community or joint interest between said complainants in regard to the matter in dispute, as complainants are different owners of distinct and separate pieces and parcels of real property.

(d) Because the city charter and said ordinances of the defendant, or the levy of said sewer assessment or

the subject matter of the action mentioned in said complaint, are not in violation of the provisions of the fourteenth amendment to the constitution of the United States or the laws of the United States, or section thirteen, article one, of the constitution of the State of Idaho.

(e) Because there are no grounds of equity stated or facts set forth in said complaint to entitle a court of equity to proceed and determine the suit or grant the relief prayed for.

Second.—The Court erred in adjudging and decreeing that all adverse claims of the defendant to the premises of said complainants or any part thereof described in the decree entered herein are invalid and groundless, and that the several lots, blocks, and tracts of said premises, and every part and parcel thereof, and the title of said complainants thereto, is adjudged to be quieted against all claims and demands of the defendant.

Third.—The Court erred in adjudging and decreeing that the tax certificate of sale issued on the 21st day of June, 1899, to the defendant by Mrs. Carrie E. Myers, as city tax collector, against the property of each of said complainants described in said decree entered April 19th, 1901, and each of said tax certificates are void and of no legal force or effect.

Fourth. The Court erred in adjudging and decreeing that the complainants are entitled to an injunction, and decreeing that the defendant is perpetually estopped from setting up any claim to the said property of the complainants described in the decree herein, or any part thereof by reason of said tax certificates of sale or any

deed which said defendant may have acquired under and by virtue of said tax certificates of sale or the proceedings upon which said certificates of sale were based or issued.

Fifth.—The Court erred in deciding and adjudging that under the evidence in this case said sewer assessments were not levied according to the benefits conferred upon complainants property, by reason of the construction of said sewer in sewer districts numbers two and three of Boise City, and that said lots, blocks, and tracts of property against which said assessments were made were not benefited to the amount of each assessment.

Sixth.—The Court erred in deciding and adjudging that under the evidence in this case said sewer assessments were void and of no legal force or effect.

In order that the foregoing assignment of errors may be and appear of record, the appellant presents the same to the Court and prays that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

C. C. CAVANAH,
Solicitor for Defendant.

Now, on this 26th day of April, 1901, having considered the foregoing petition and assignment of errors, the same is allowed as prayed.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Petition for allowance of appeal and assignment of errors. Filed April 26th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Central Division of the District of Idaho.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA O'FARRELL, ANGELINE O'FARRELL and R. E. EMERSON.

Complainants,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Defendant.

Allowance of Appeal.

The above-named defendant, Boise City, a municipal corporation of the State of Idaho, conceiving itself aggrieved by the judgment and decree entered in the above-entitled court on the 19th day of April, 1901, in the above-entitled proceedings, does hereby appeal from said judgment to the Court of Appeals of the United States for the Ninth Judicial Circuit, and prays that its appeal may be allowed, and that a transcript of the records and proceedings upon which said judgment was made, duly

authenticated, may be sent to the said Circuit Court of Appeals.

C. C. CAVANAH,
Solicitor for Defendant.

And now, to wit, on this 26th day of April, 1901, it is ordered that the said appeal be allowed as prayed for, and the bond on appeal is fixed at $300.00.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Allowance of appeal. Filed April 26th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Central Division of the District of Idaho.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA O'FARRELL, ANGELINE O'FARRELL and R. E. EMERSON,
Complainants,
vs.
BOISE CITY, a Municipal Corporation of the State of Idaho,
Defendant.

Bond on Appeal.

Know all men by these presents, that we, Boise City, a municipal corporation of the State of Idaho, as princi-

pal, and the American Bonding & Trust Company of Baltimore City, Maryland, as surety, are held and firmly bound unto the above-named complainants, Robert B. Wilson, Eveline O'Farrell, Teresa O'Farrell, Angeline O'Farrell, and R. E. Emerson, in the sum of $300.00, to be paid to the said complainants, Robert B. Wilson, Eveline O'Farrell, Teresa O'Farrell, Angeline O'Farrell, and R. E. Emerson, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, and successors, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of April, 1901, in the year of our Lord one thousand nine hundred and one.

Whereas, the above-named defendant, Boise City, a municipal corporation of the State of Idaho, has prosecuted an appeal in the above entitled suit and cause to the Circuit Court of Appeals of the United States, in and for the Ninth Judicial Circuit, to reverse the decree rendered in the above-entitled suit by the Judge of the Circuit Court of the United States for the District of Idaho, rendered and entered on April 19th, 1901:

Now, therefore, the condition of this obligation is such, that if the above-named Boise City, a municipal corporation of the State of Idaho, shall prosecute such appeal to effect and answer all damages and costs, if it fail to make such appeal good, then this obligation shall be

void; otherwise the same shall be and remain in full force and virtue.

BOISE CITY,

A Municipal Corporation of the State of Idaho.

By H. N. COFFIN,

President of the Council of Boise City, Idaho.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, MARYLAND.

By HORACE E. NEAL,

Vice-Prest.

Attest: CHARLES F. NEAL,

Asst. Secty.

Approved by:

[Seal] JAS. H. BEATTY,

Judge.

[R. S.]

At a regular meeting of the board of directors of The American Bonding and Trust Company of Baltimore City, held at its office, Equitable Building, city of Baltimore, Maryland, on the eleventh day of July, 1899, the following resolution was unanimously adopted;

Whereas, The American Bonding and Trust Company of Baltimore City has been duly authorized by the proper authority of the State of Idaho to transact business therein, and has established an office for the transaction of such business at Boise, in the county of Ada in said State;

And whereas, it is necessary to the transaction of its business to have certain classes of bonds executed with promptness at places other than the office of the company at Baltimore, Maryland.

Therefore, it is resolved by the board of directors of The American Bonding and Trust Company of Baltimore City that from and after the passage of this resolution there be, and is hereby, constituted an advisory board in and for said State, consisting of Horace E. Neal, W. S. Bruce, Frank R. Coffin, George Spiegel, M. B. Zimmer and Charles F. Neal, who are hereby elected and constituted such advisory board of The American Bonding and Trust Company of Baltimore City, and the said Horace E. Neal and Frank R. Coffin are hereby constituted and appointed vice-presidents of said company for the State of Idaho; and Charles F. Neal is hereby constituted and appointed assistant-secretary of said company for the State of Idaho, and there is hereby vested in said Horace E. Neal and Frank R. Coffin as vice-presidents, and in each of them, full right, power, and authority to execute, sign, seal, and deliver, when attested by the signature of Charles F. Neal, as assistant secretary, in the name and on behalf of said company, any and all bonds, obligations, or undertakings required in judicial proceedings, in any and all courts in said State of Idaho and in the United States Circuit and District Courts in said State, and all bonds, obligations or undertakings so executed shall be as binding in effect as fully as if executed by the president and secretary of this company at its office in Baltimore, Md.

CERTIFICATE.

We, Ernest *Noen*, Jr., vice-president, and *Saluel* H. Shriver, secretary, of The American Bonding and Trust Company of Baltimore City, hereby certify that the foregoing is a true and correct copy taken from the records of the proceedings of the board of directors of The American Bonding and Trust Company of Baltimore City, and that it contains the whole of said original resolution.

In witness whereof we have hereunto subscribed our names and affixed the corporate seal of The American Bonding and Trust Company of Baltimore City, at Baltimore, Maryland, this eleventh day of January, 1901.

[Seal] ERNEST HOEN,
Vice-President.

[R. S.]

State of Maryland, }
City of Baltimore. } ss.

On this eleventh day of January, A. D. 1901, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Ernest Hoen, Jr., vice-president, and Samuel H. Shriver, secretary of The American Bonding and Trust Company of Baltimore City, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself, disposeth and saith that they are the said officers of the company

aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal at the city of Baltimore, the day and year first above written.

[Seal] HOWARD ABRAHAMS,
Notary Public.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Bond on Appeal. Filed April 26th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Central Division of the District of Idaho.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA O'FARRELL, ANGELINE O'FARRELL and R. E. EMERSON,

Complainants,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Defendant.

Notice of Citation on Appeal.

To the Complainants Above Named, and to Alfred A. Fraser, Their Solicitor:

You are hereby notified that Boise City, a municipal corporation of the State of Idaho, defendant, named in the decree entered in said court on the 19th day of April, 1901, has taken an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that a copy of the citation on such appeal, allowed and signed by the Judge of the above-entitled court April 26th, 1901, has lodged in the office of the clerk of said Circuit Court for you as by law required.

April 26th, 1901.

C. C. CAVANAH,
Solicitor for Defendant.

Service of a copy of the above notice admitted this 26th day of April, 1901.

ALFRED A. FRASER,
Solicitor for Complainants.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robert B. Wilson et al. vs. Boise City. Notice of citation of appeal. Filed April 26th, 1901. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Central Division of the District of Idaho.

ROBERT B. WILSON, EVELINE O'FARRELL, TERESA O'FARRELL, ANGELINE O'FARRELL and R. E. EMERSON,
Complainants,
vs.
BOISE CITY, a Municipal Corporation of the State of Idaho.
Defendant.

Citation.

United States of America—ss.

The President of the United States, to Robert B. Wilson, Eveline O'Farrell, Teresa O'Farrell, Angeline O'Farrell, and R. E. Emerson, Greeting:

You are hereby cited and admonished to be and appear at a term of said Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Fran-

cisco, in the State of California, on the 27th day of May, 1901, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States, for the Central Division of the District of Idaho, from a decree, signed, filed and entered on the 19th day of April, 1901, in that certain suit No. 183, wherein Boise City, a municipal corporation of the State of Idaho, is respondent and appellant, and you are complainants and appellees, to show cause, if any there be, why the said decree and judgment rendered and entered in the above-entitled court and cause on the 19th day of April, 1901, should not be reversed and set aside, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JAMES H. BEATTY, United States District Judge for the Central Division of the District of Idaho, this 26th day of April, 1901.

JAS. H. BEATTY,
Judge.

Service of the within citation and receipt of a copy thereof admitted this 26th day of April, 1901.

ALFRED A. FRASER,
Solicitor for Complainants and Appellees.

[Endorsed]: No. 183. United States Circuit Court, Central Division, District of Idaho. Robt. B. Wilson et al. vs. Boise City. Citation. Filed April 26, 1901. A. L. Richardson, Clerk.

Return to Citation.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Test:

[Seal] A. L. RICHARDSON,
Clerk.

In the Circuit Court of the United States for the Central Division of the District of Idaho.

ROBERT B. WILSON et al.
vs.
BOISE CITY.

Clerk's Certificate to Transcript.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 74, inclusive, to be a full, true, and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs upon appeal in said cause, amounting to the sum of $60.20, has been paid by the said appellant.

Witness my hand and the seal of said Court affixed at Boise, Idaho, this 2d day of May, A. D. 1901.

[Seal] A. L. RICHARDSON,
Clerk.

[Ten Cent U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: No. 699. In the United States Circuit Court of Appeals for the Ninth Circuit. Boise City, a Municipal Corporation of the State of Idaho, Appellant, vs. Robert B. Wilson, Eveline O'Farrell, Teresa O'Farrell, Angeline O'Farrell, and R. E. Emerson, Appellees. Transcript of Record. Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Filed May 6, 1901.

F. D. MONCKTON,
Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.

ROBERT B. WILSON et al.,
Complainants,

vs.

BOISE CITY, A Municipal Corporation of the State of Idaho,
Defendant.

Bill of Exceptions.

Be it remembered that on the 12th day of March, 1901, the demurrer to the complaint herein having been here-

tofore argued and submitted, and the Court, being now fully advised in the premises, ordered that said demurrer be, and the same is hereby, overruled. To which ruling the defendant, by its counsel, then and there excepted in due form of law, which exception is allowed by the Court.

Dated this 12th day of March, 1901.

(Signed) JAS. H. BEATTY,
Judge.

Service of a copy of the above order of Court accepted and admitted this 11th day of September, 1901.

ALFRED A. FRASER,
Attorney for Plaintiffs.

The United States of America,
District of Idaho. } ss.

I, A. L. Richardson, clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of bill of exceptions in cause No. 183, Robt. B. Wilson et al. vs. Boise City, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court in said District this 22d day of August, 1901.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 183. United States Circuit Court, District of Idaho. Robt. B. Wilson et al. vs. Boise City. Certified Copy of Bill of Exceptions. Filed Aug. 22d, 1901. A. L. Richardson, Clerk.

U. S. C. C. A. No. 699. Filed Oct. 16, 1901. F. D. Monckton, Clerk.

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IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

BOISE CITY, A Municipal Corporation of the State of Idaho, Plaintiff in Error,

vs.

ROBERT B. WILSON, EVALINE O'FARRELL, TERESA G. O'FARRELL, ANGELINE O'FARRELL, and R. E. EMMERSON, Defendants in Error.

Appeal from the District Court of the United States for the District of Idaho.

BRIEF OF PLAINTIFF IN ERROR.

C. C. CAVANAH,
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

BOISE CITY, A Municipal Corporation of the State of Idaho, Plaintiff in Error,

vs.

ROBERT B. WILSON, EVALINE O'FARRELL, TERESA G. O'FARRELL, ANGELINE O'FARRELL, and R. E. EMMERSON, Defendants in Error.

Appeal from the District Court of the United States for the District of Idaho.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action in equity brought to remove several alleged clouds from the title of distinct and separate pieces and parcels of real property by testing the constitutionality of certain sewer assessments levied separately against the property of the defendants in error to pay the cost of a local sewer, constructed by the plaintiff in error in front of the property of said defendants in error. The defendants in error join together in this action and allege, in substance, in their complaint, that they own in severalty certain property situated in Boise City, Idaho; that during the month of March, 1898, the Common Council of Boise City ordered to be laid and constructed in the alleys of

Sewer Districts Numbers Two and Three of said Boise City, a local sewer in front of their said premises; that during the month of November, 1898, said Common Council of said Boise City passed an ordinance levying a special assessment against said property of the defendants in error to pay the cost of said sewer; that each of the defendants in error refused to pay the said amounts so assessed and allowed said property to be sold separately by the City Tax Collector of said Boise City; that the amounts assessed separately against each of defendants' in error property, are, Robert B. Wilson, $365.29; Evaline O'Farrell, Teresa O'Farrell, Angeline O'Farrell, $837.63, and R. E. Emmerson, $125.96. A demurrer to the complaint was filed, argued and overruled by the Court, and the Court, in overruling the demurrer, made and filed its opinion. (Transcript, pp. 22 and 26.)

To the order overruling the demurrer the plaintiff in error then and there duly excepted; the exception was allowed and made a part of the record.

An order was made substituting the names of Eveline O'Farrell, Teresa O'Farrell and Angeline O'Farrell as parties plaintiff in lieu of John O'Farrell, deceased, they being the joint owners of the property of said deceased plaintiff, John O'Farrell. (Transcript p. 33.)

The plaintiff in error then filed its answer, denying specially all the material allegations of the complaint, which answer was, without any objection on the part of the Court or counsel for the defendants in error, permitted to remain on file in the records of this case. (Transcript p. 34.)

Upon the issue so joined the cause was submitted to the Court for decision upon an agreed statement of facts. (Transcript p. 47.)

The Court then filed its opinion upon the agreed state-

ment of facts and rendered judgment for the defendants in error, decreeing that the titles of the property of each defendant are quieted against all claims and demands of the plaintiff in error, and that each of said tax certificates of sale are void and of no legal effect, and perpetually enjoined the plaintiff in error from setting up any claim to said premises. (Transcript pp. 64 and 65.)

Specifications of Error.

The plaintiff in error will rely upon the following errors:

First—The Court erred in holding and deciding that the complaint herein does states facts sufficient to constitute a cause of action; and in overruling defendant's demurrer to said complaint for the following reasons, to wit:

(a) Because the Court had no jurisdiction to hear and determine the matters stated in said complaint.

(b) Because the complaint is multifarious, as it appears therefrom that said complainants are not in any manner in common or jointly interested or concerned and are different owners of distinct and separate pieces and parcels of real property.

(c) Because there is a misjoinder of parties complainants, as it appears from said complaint that there is no community or joint interest between said complainants in regard to the matter in dispute, as complainants are different owners of distinct and separate pieces and parcels of real property.

(d) Because the city charter and said ordinances of the defendant in question, or the levy of said sewer assessments or the subject matter of the action mentioned in said complaint, are not in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States or the laws of the United States, or Section

thirteen, Article one, of the Constitution of the State of Idaho.

(e) Because there are no grounds of equity stated or facts set forth in said complaint to entitle a court of equity to proceed and determine the suit or grant the relief prayed for.

Second—The Court erred in deciding and adjudging that under the evidence in this case said sewer assessments were not levied according to the benfits conferred upon complainants' property, by reason of the construction of said sewer in Sewer Districts Numbers Two and Three of Boise City, and that said lots, blocks and tracts of property against which said assessments were made were not benefited to the amount of each assessment.

Third—The Court erred in deciding and adjudging that under the evidence in this case said sewer assessments were void and of no legal force or effect.

The second, third and fourth assignments of errors set forth in the transcript raises the same principles discussed under the first, second and third assignment of errors relied upon in this brief.

ARGUMENT.

In discussing the first and most important question presented by the record, we will consider together (a) and (d) under the first assignment of errors, as they both go to the question as to whether or not the Court had jurisdiction to hear and determine the matters stated in said complaint. We then ask the question, Did the Court err in holding and deciding when ruling upon the demurrer that the Court had jurisdiction to hear and determine the matters recited in said complaint, and that the city charter and ordinances in question of the plaintiff in error and the levy of said sewer assessments are in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States?

The provisions of the city charter of Boise City under which authority is granted to the Common Council of said city to levy said sewer assessments and which the Court is called upon to say whether or not it is in violation of the above provision of the Constitution of the United States, read as follows:

Section 5, Subd. 26. "To open and establish streets, avenues, lanes and alleys and widen the same, and for that purpose to condemn property for the city use, under such regulations as are or may be provided by law. To grade, pave, plank, macadamize, gravel, curb or otherwise improve, repair or beautify the highways, streets, avenues, lanes, alleys and sidewalks of the city; and to provide for the payment of the expense thereof, to levy special assessments upon property that is contiguous to or abutting or fronting upon the highway, street, avenue, lane, alley or sidewalk, to be granded, paved, planked, graveled, curbed, macadamized or otherwise improved or beautified, by such ordinances as in the opinion of the City Council shall secure a just and equitable apportionment of such assessments among the lots or parcels of such contiguous, abutting or fronting property. Special assessments so levied shall constitute a lien upon the property assessed and the payment thereof may be enforced as the payment of taxes on real estate is enforced in said city.

"Twenty-seventh. To divide the city into convenient sewer districts, and upon petition of a majority of the resident property owners of any such district to provide for the construction of, and to construct sewers within such district; the expense thereof to be defrayed by special assessments upon the property contiguous to, or abutting or fronting upon the street, alley, avenue, or lane through or along, or on the line of which the sewer may run. Such

special assessments to be apportioned, levied and collected in the same manner as provided in Subdivision 26 of this section. Approved March 12, 1897. Laws of Idaho 1899 pp. 310-18,

It is undoubtedly the settled rule in the Federal Courts of this country today, that statutes authorizing special assessments to be levied against abutting property for local improvements based on the frontage rule are valid and not in violation of any provision of the Constitution and laws of the United States.

The Supreme Court of the United States has in recent decisions sustained statutes authorizing municipalities to assess and apportion the benefits of a local improvement according to the front foot rule.

Town of Tonawanda et al. vs. James B. Lyon, 21 Sup. Ct. 609.

Mortimer Webster vs. City of Fargo, 21 Sup. Ct. 623.

City of Detroit et al. vs. Ralzemond Parker, 21 Sup. Ct. 624.

Margaret French et al. vs. Barber Asphalt Pav. Co. 21 Sup. Ct. 625.

Gass Farm Company, Ltd. vs. City of Detroit, 21 Sup. Ct. 644.

Wight vs. Davidson, 21 Sup. Ct. 616.

Farrell vs. Commissioners, 21 Sup. Ct. 609.

Lombard vs. Same, 21 Sup. Ct. 507.

White vs. City of Tacoma, 109 Fed. 32.

Zehnder vs. Barber Asphalt Pav. Co. 108 Fed. 570.

We find from the opinion of the learned Judge in the Court below when in deciding this case he held that the rule laid down in the case of Village of Norwood vs. Baker, 172 U. S. 269-303, applied to the case at bar. But upon an examination of the decisions above cited it will be discovered that the Supreme Court of the United States has cor-

rected a misunderstanding of the decision in the case of Village of Norwood vs. Baker, and these late decisions recognize the fact that the per front foot plan may be a fair method of apportioning the cost of a local improvement.

Local assessments of this kind have been universally sustained by the text writers and courts of this country where there has been a special benefit or advantage to the person who owns said property and the property itself.

Munc. Corp. Cases, Vol. 3, p. 652.
Dillon Munc. Corp. Vol. 2, Secs. 752, 761, 809.
Elliott on Roads and Streets, New Ed. pp. 580-582.
Cooley on Const. Lim. pp. 629-634.
Gillett vs. City of Denver, 21 Fed. 822.
Harney vs. Benson (Cal.), 45 Pac. 687.
Rolph vs. City of Fargo, 76 N. W. 242.
Douglas vs. Craig, 46 Pac. 197.
Beaumont vs. City of Wilkesbarre, 21 Atl. 888.
Hutcheson et al. vs. Storrie et al. 48 S. W. 785.
Bacon vs. City of Savannah, 31 S. E. 127.
City of New Wheaton vs. Billingham Ba. Imp. Co., 47 Pac. 236.
Schley vs. Detroit, 45 Mich. 431.
Sears vs. Boston, 43 L. R. A. 834.
City of Raleigh vs. Peace, 17 L. R. A. 330.

Counsel for the defendants in error will undoubtedly rely very much on the case of Norwood vs. Baker. That was a case of the taking of private property for public use—the exercise of eminent domain, and so exercised as to take the property, not only without payment, but so as to charge for the taking. And again, that was an assessment for opening up a street, and a street is public, for the public, and the benefits, and the rule and reason

of the benefits, entirely different from that of a local sewer. In our opinion, that case has no application whatever. It was the taking of the property in such a way as to take all of defendant's land used for the street. It was worse than taking it without pretense of remuneration—worse than simple confiscation.

The language of the Court with regard to the rule laid down of the benefits in that case must be understood as applied to the facts before the Court. And we might pause to ask, if the owners of the lots mentioned in the bill of complaint herein are not to pay for their own local sewerage, who is to pay? Are the owners of other lots in other blocks? Are the owners of all the property, both personal and real, in the city to pay? To compare this case with the case of Norwood vs. Baker is to be blind of the fact that the language of the Court has no meaning except as related to the matter before it. There was the taking of private property, not only without any pay, but the taking under an expense to the owner of $218.58. There the Court had before it the case of an exercise of the right of eminent domain in such a manner as to take private property for public use, and charge the owner $218.58 for so doing. There, too, the use was a public use, general in its nature, but here, in this case, there is nothing tending to show that private property is being taken. It seems to us to be almost a general, self-evident proposition, that the benefits of a local sewer are in proportion to the land fronting on the same.

Since the decision of the Norwood case the Supreme Courts of Michigan, Wisconsin, North Dakota and Minnesota have, following their former decisions, upheld special assessments for a sewer district and for street paving made under State statutes, authorizing such assessments upon the front foot rule and upon the area rule re-

spectively. These decisions, therefore, tender this issue: Does the ruling in the prevailing opinion, in the Norwood case, apply to and determine the validity of all statutory special assessments, based upon front foot rule and area rule of assessment of property, to pay cost of adjacent street paving, sewers, etc.?

The Michigan Supreme Court, in discussing the Norwood case, in an action wherein the Gass Farm Co. vs. Detroit, a suit concerning an assessment for paving in the City of Detroit, made under and according to the State statute, in proportion to the frontage of the property on the street paved, uses the following language:

"We should feel inclined to follow the opinion of the Supreme Court of the United States in Village of Norwood vs. Baker, inasmuch as it was based upon the Fourteenth Amendment of the Constitution of the United States, if that were a paving case, but that was a street opening case, and until that Court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions."

Gass Farm Co. vs. Dertoit, 83 Northwestern Rep. 108.

The case of Gass Farm Co. vs. Detroit went to the Supreme Court of the United States and the Supreme Court of Michigan was sustained.

Gass Farm Co. vs. Detroit, 21 Supt. Ct. 644, *supra.*

In Heman vs. Allen, the Supreme Court of Missouri, on June 4th, 1900, upheld a special assessment against a parcel of land for a district sewer, constructed under the charter and ordinances of the City of St. Louis, the city being authorized by its charter to create sewer districts in the city and to build sewers. The provision of the charter

under which the assessment was made, prescribing the area rule, reading as follows:

"As soon as a district sewer with its inlets, manholes and other appurtenances is fully completed, said board (public improvements) shall cause to be computed the whole cost thereof and shall assess it as a special tax against all the lots of ground in the district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway."

The Court says of the Norwood case: "The facts upon which the case was decided are so unlike the facts in the case at bar, that we do not think it controlling authority in this." This Court points out very clearly that it was the land of Mrs. Baker that was taken for the street, to pay for which, and the cost of the proceedings.

We call attention to a recent case decided by the Court of Appeals of New York in distinguishing the Norwood case from assessments like the one at bar.

Code vs. Schenectady, 58 N. E. 130.

The Norwood case is also referred to and discussed in the recent decisions of the Supreme Court of the United States cited above.

It was held by the Court below that the charter of Boise City failing to provide in express terms a hearing to be granted to the owners of property who are to be assessed is in violation of the Constitution of the United States, as it would be taking private property without due process of law, but we find that the Supreme Court of the United States in several of its recent decisions used the following language:

Syllabi. "An assessment of the cost of a street improvement, made arbitrarily according to the front foot, is not

in violation of the Constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefited to the amount of the assessment."

City of Detroit et al. vs. Parker, *supra.*
French et al. vs. Barber Asphalt Pav. Co., *supra.*
Town of Tonawanda et al. vs. Lyon, *supra.*
Paulsen vs. City of Portland, 149 U. S. 30, L. Ed.

The city charter in question is not unconstitutional because there is no express provision of notice of an intention to levy an assessment against the property benefited.

Allen vs. Charleston, 111 Mass. 123.
Strowbridge vs. Portland, 8 Or. 83.

The record shows that prior to the levy of the assessments in question notice was given to all persons owning property in said sewer districts of a hearing which was granted to them, and the defendants in error each had knowledge of the same. (Transcript, p. 57.)

As notice was actually given, the proceedings would have been valid even if the charter and ordinances had all been silent upon the matter of notice.

Davidson vs. New Orleans, 96 U. S. 616, L. Ed.
Hager vs. Reclamation Dist. No. 108, 111 U. S. 569, L. Ed.

"It is not essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice to the taxpayer of an assessment for the construction of a sewer.

"Notice by publication is a sufficient notice to the taxpayer in proceedings for the assessment of a tax on his property for the construction of a sewer.

If provision is made for notice to an hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Paulsen et al. vs. City of Portland, 149 U. S. 29, L. Ed.

The great majority of cases which hold to the doctrine that there must be given an opportunity to be heard, admit that it is not necessary that it should be provided for in the charter itself, but it may be provided for by ordinance or resolution of the council, where the charter is silent on the subject.

Notice of an intention to put down sewers, or of the district or property to be assessed therefor, is not necessary unless required in the charter, nor would the charter or ordinances be unconstitutional for want of such notice.

If we are correct in our conclusion that the above decisions of the Supreme Court of the United States upholds the statute and ordinances in question, then the Court had no jurisdiction to proceed and determine this controversy when there is no Federal question involved.

(e) We contend that there are no grounds of equity stated or facts set forth in said complaint to entitle a court of equity to proceed and determine this suit or grant the relief prayed for. Upon an examination of the bill of complaint it will be discovered that there is no allegation tending to establish any act of injustice to have been done to the defendants in error, or either of them, by reason of the construction of said sewer or the levying of said assessment. There is no complaint that said assessments are unjust, unequal or in excess of the amount of benefits derived by said properties by reason of being connected

with said sewer, and we know of no stronger language in which to present this phase of the case than that used by the learned Judge in the Court below when, in deciding the demurrer, after referring to the Norwood case, the Court says: "I can not say that that case so impresses me, when its facts are considered, and it would seem that there is reason left to apply a different rule to a case like this. In that case there was not only an actual taking of private property for public use, and not only without any compensation, but costs for the taking were charged to the owner. Here, there is no taking of property, but a necessary improvement is put upon public land for the benefit and convenience of the owners of the abutting property, as well as for the health of the community. It was a necessary and unavoidable improvement; if we consider at all the health and convenience of the people, its cost was assessed in the only equitable and just way that it can be." (Transcript, pp. 30 and 31.)

As has been said above, the complainants nowhere show nor claim that they would be injured by the rule of assessment followed in regard to this local sewer. They do not even claim that the proportion of frontage does not measure their respective proportions of benefit derived from the building of the sewer. In fact, so far as their complaint is concerned, it may be that they are each benefited more by the rule which has been followed than by any other rule of adjustment that could be made. The rules with regard to adjustment of benefits for public parks, for sidewalks, for streets, and for sewers are not exactly the same. The public has more use of the street, and still more of the park, and of the sidewalk it may be said, and has been said, that it is more particularly for the benefit of the lot along which it is built than is the public street; but of the local sewer it is apparent that the benefit is al-

most wholly and solely to the persons who own property abutting upon the same? Yet learned counsel seems to discussed the question as if *per se* the rule adjusting assessments by the front foot was illegal, unconstitutional and void. The authorities do not agree with him, and I believe he has found, and can find, no authority against such a rule where the assessment was for a local sewer. It is but right for each lot owner to build his own fence or wall to keep out live stock and equally proper for him to build his own wall along his own premises, to fortify them against the poisoning infection of his own microbes, and the sewer is such a wall. Let every man build the wall over against his own house and the city will be fortified against the enemy disease.

We believe it to be the correct rule that the Federal Courts will not consider the question as to whether a State statute was constitutionally enacted or whether it is in collision with the State constitution where there is no diversity of citizenship alleged, as it does not involve a Federal question.

Jackson vs. Lampshire, 29 U. S. 278, L. Ed.

McCain et al vs. City of Des Moines et al. 84 Fed. 726.

This question was decided by the court below in favor of our contention. (Transcript p. 28.)

Second—Did the Court err in holding and deciding when ruling upon the demurrer that the complaint herein was not multifarious and there is not a misjoinder of parties complainants in this action?

The plaintiff in error contends that under the facts disclosed by the complaint that there is a misjoinder of parties plaintiff and causes of action in this case, because it appears from the complaint that the defendants in error

are different owners of distinct and separate pieces and parcels of real property; that there is no common pecuniary interest in one another's property; that the amounts of their assessments are different; that separate tax certificates of sale have been issued to the plaintiff in error covering said properties; that each of defendants in error are endeavoring to remove separate alleged clouds from his or her property; that they are jointly asking the Court to quiet title to their separate and unconnected descriptions of property by declaring void three separate tax certifiates of sale, in one complaint. (Transcript, pp. 1 to 18, inc.)

The general rule in equity cases is, that owners in severalty of separate and distinct parcels of land who are endeavoring to remove a cloud from their property, can not join together or unite their grievances in one action and complaint, as there is no community or joint interest in one another's property.

Greene vs. Liter, 8 Cranch, 229.

Cutting et al. vs. Gilbert et al. 6 Fed. Cas., No. 3, 519.

Summerlin et al. vs. Fronteriza S. Min. & M. Co. et al. 41 Fed. 249.

Stebbins et al. vs. S. T. Anne et al. 116 U. S. 667, L. Ed.

Security Sav. & Loan Assn. vs. Bushman et al. 14 U. S. Ct. App. 97.

Ex Parte Baltimore & O. R. Co. 106 U. S. 78, L. Ed.

Sioux Falls Nat. Bank vs. Swenson et al. 48 Fed. 621, 625.

In the case of Cutting et al. vs. Gilbert et al. *supra*, which was a bill in equity filed in the Circuit Court for the Southern District of New York by six firms licensed

and doing business as bankers and brokers under the Internal Revenue Laws of the United States, against the assessor and collector of the district contesting the legality of the tax, it was held by Justice Nelson that, "In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved, which alone can not lay a foundation for a joinder of parties; * * * to allow them to be made parties to the suit would confound the established order of judicial proceedings and lead to endless perplexity and confusion. I am satisfied, therefore, that this bill can not be sustained, on account of the joinder of improper parties as plaintiffs."

The Supreme Court of the United States, in discussing this subject in the case of Greene vs. Liter, *supra,* said: "If there are several tenants, claiming several parcels of land by distinct titles, they can not lawfully be joined in one suit, and if they are, they may plead an abatement of the writ."

In the action below, a suit in equity was brought by nine persons owning property in severalty to restrain the Board of Public Works of said District from proceeding to collect certain special assessments which had been assessed against certain property, fronting on the avenue, to pay the costs of an improvement constructed on New York avenue. The Court, in an able opinion, written by Justice McArthur, said: "Syllabi. Individual taxpayers whose property has been separately assessed has not that community of interest which will allow them to unite in the bill of complaint to restrain the collection of taxes alleged to be legally assessed, on the ground of preventing a multiplicity of suits."

Harkness vs. Board of Public Works, 1 McArthur, 121.

In the above case the decisions from the Supreme Courts of Wisconsin and Connecticut were considered and approved by the Court.

There can be no community of joint interest in the subject of litigation, which is a removing of three separate alleged clouds from the title of each plaintiff. If the assessments in question are not legal, then there may be an apparent cloud to the amount so assessed on each lot. Each plaintiff is interested only in removing this cloud from his own lots, and not from the lots belonging respectively to his coplaintiff.

There is no such common pecuniary interests as authorizes them to unite in one suit as plaintiffs to obtain the relief asked. Each can sue alone, and the others are not necessary parties. This is not an action respecting a common fund, nor to restrain acts injurious to property in which all the plaintiffs have a common or joint interest. But the plaintiffs set forth separate causes of actions, one in favor of each plaintiff. Their property is situated in two different sewer districts in the city. The sum demanded of each is distinct and separate, and it does not concern one of the complainants whether another pays or not. All the joint interests the parties have is a joint interest in a question of law; just such an interest as might exist in any case where separate demands are made of several persons.

In support of the same rule, we invite the Court's attention to the following decisions of the State Courts:

Dodd et al. vs. City of Hartford, 25 Conn. 231.
Brunner et al. vs. Bay City et al. 46 Mich. 236.
Newcomb vs. Horton, 18 Wis. 594.
Barner et al. vs. The City of Beloit, 19 Wis. 93.
Carey vs. Brown et al. 58 Cal. 180, 183.
Jones et al. vs. Cardwell et al. 98 Ind. 331.

This question is well explained by the Supreme Court of Connecticut in the case of Dodd et al. vs. City of Hartford, *supra*, where a joint petition was filed to restrain the collection from several complainants of sewer assessments made upon their lands, severally, and which were claimed to be illegal. The Court said: "The claim most pressed by the petitioners is that the Court ought to entertain jurisdiction in order to prevent a multiplicity of suits. But no one of these petitioners has any interest in the suit which another of them may be called upon to institute. They can not individually complain that others are compelled to sue, for they have no share in the expense or vexation of each other's suits. The multiplicity of suits which the petition seeks to avoid does not affect injuriously any one of the petitioners. No one of them has any occasion to expect any such multiplicity affecting himself. One suit is all that any one of them has to fear, and the object of this bill would seem to be to relieve these parties, severally, from that one suit, and to consolidate the apprehended litigation. In other words, to enforce a consolidated rule, by means of the extraordinary powers of a court of chancery. If the assessment were against one person, only, it is not claimed that he could transfer from a court of law to a court of equity, the question of his liability. But how is the condition of any one of these petitioners the worse, because others are assessed for the same improvement? It would undoubtedly be convenient to try the questions relating to these warrants in one comprehensive law suit. But it does not seem to the Court that the case presented by the bill is one of such irreparable injury or of inadequate relief at law, as to warrant us in taking it away from the legal tribunals."

The Supreme Court of Michigan says: "This is a bill filed by a large number of persons whose lots have been

bid in by Bay City under a sewer assessment to have the sales set aside as illegal."

"Syllabi. Joint suits will not lie in a case in which there is no common interest on one side or the other. A joint bill for relief against a tax sale will not lie where the complainants have no common grievance beyond being owners in severalty of distinct parcels of land sold for the tax."

Brunner et al. vs. Bay City et al. *supra.*

Says the Supreme Court of Wisconsin: "There is no general or common interest affected by the assessment and tax in this case. The property is owned in severalty, and each taxpayer may sue alone and obtain complete relief so far as his rights and property are concerned. There is no necessity for one taxpayer to unite another with him in a suit for this purpose."

Newcomb vs. Horton, *supra.*

"Two or more lot owners in a city can not unite in an action to restrain the sale of lots owned by them, severally, for taxes illegally assessed, or to prevent the execution of deeds for such lots upon such sale; but each must bring his several suit."

Barnes et al. vs. The City of Beloit, *supra.*

The rule is laid down in Texas that "a joint action by several claiming separate and distinct portions of a league of land, brought to recover their respective parts, is irregular, and an objection to such joint action, if made at a proper time and in a proper manner, should be sustained."

Allen et al. vs. Read et al. 66 Tex. 13.

The case below is one directly in point. A special as-

sessment was levied by the City Council of Portland against certain property to pay the expense of a sewer, and the Supreme Court of Oregon said: "Syllabi. *Held*, that where an assessment is levied upon property for a share of the cost of local improvement, which is so situaated that it can not possibly be benefited thereby, the owner of the property may maintain a suit to prevent the enforcement of the assessment; but that different owners of distinct parcels of property so assessed have no right to join as plaintiffs in such suit."

Poulsen et al. vs. City of Portland, 1 L. R. A. 673.

The above cause went to the Supreme Court of the United States and, in an opinion written by Justice Brewer, the decision of the Supreme Court of Oregon, holding that the assessment was legal and the property owners could not recover in the action, was sustained.

Poulson et al. vs. City of Portland, 149 U. S. 29, L. Ed.

In the case below, which was an action to quiet title under three tax deeds upon different tracts owned by different owners, the Court said: "Syllabi. Complaint (under Chapter 22, Laws of 1859) to quiet title by the holder of three tax deeds upon different tracts, where the former owners were different, except that one defendant was owner of some of the parcels named in each deed. *Held*, that there was a misjoinder of causes of action."

Turner vs. Duchman, 23 Wis. 500.

"A bill by a number of owners of lots to restrain the prosecution of individual ejectment suits against them by one claiming a dower interest in the lots is multifarious."

Douglas et al. vs. Boardman et al. 71 N. W. 1100.

In the case below, where thirteen plaintiffs brought an action to remove a cloud upon the titles of their respective pieces of land, caused by a mortgage upon the whole of said land, and on demurrer the question that several causes of action have been improperly united, and in speaking of whether one of them had an interest in the lands of the others, the Court said: "Briefly stated, what is attempted here is to unite in one action several distinct and separate causes of action existing in favor of distinct parties, whose interests are several, and neither of whom has any interest in the cause of the others."

Utterback et al. vs. Meeker et ux. 16 Wash. 185.

In the cause below the Supreme Court of Kansas holds that two plaintiffs can not join in one action to test the legality of a tax upon property owned by them in severalty.

Hudson vs. Atchison, 12 Kan. 140.

We can not see how the defendants in error have a right to join as complainants in a suit to obtain the relief asked for in their complaint, as the assessment and attempted enforcement of it are the grounds of the complaint, and, as respects each owner of said properties, are several in their nature—are distinct acts.

In the case below Johnston Moore filed a bill in equity against one McNutt, who was Commissioner of School Lands and who had instituted a proceeding to sell certain tracts of land belonging to said Moore, which had been sold for non-payment of taxes. The other persons also claimed title to certain parts of said lands and were made defendants with McNutt. The Court said: "I think the bill is multifarious. It brings three different tracts of land with their different titles and different owners.

What interests in common have they? Why involve the owner of one distinct tract with matters of evidence and law pertaining exclusively to another tract and its owner? There is no bond in common, no unity or common interest between those four tracts, save that they are adverse to the plaintiff's claim; and that is no bond between them, giving them any affinity to one another."

Moore vs. McNutt, Commissioner, et al. 24 S. E. 682-684.

It would certainly require entirely different facts in this case to settle the question as to whether the separate lands of each defendant in error were benefited to the amount of each assessment by reason of the construction of the sewer, as the amount, location, and valuation of each description of said property are different. The amounts of the claims which the plaintiff in error holds against the property of each of the defendants in error are different, and whether the defendant made an examination of the extent of the benefits which the property of each of defendants in errer would derive by reason of the construction of said sewer would also require different proof.

In an action brought by several persons to quiet title to their property, where there were no community of interests between the plaintiffs in the property, and a joint judgment entered against the defendant perpetually enjoining the defendant from disposing of the same, the judgment was erroneous, as there was no such community of interests between the plaintiffs in the property in question as entitled them to such a decree.

Gibbons vs. Peralta et al. 21 Cal. 630.

A case bearing a strong analogy to the one before the

Court is the late case of Wheeler et al. vs. City of St. Louis, which went to the Supreme Court of the United States. Says that Court:

"Syllabi. Distinct and separate interests of complainants in a suit for relief against assessments, whether they have been made or merely threatened, can not be united for the purpose of making up the amount necessary to give jurisdiction to a Circuit Court of the United States."

Wheeler et al. vs. City of St. Louis, 179 U. S. 402.
Wheeler et al. vs. City of St. Louis, 96 Fed. 865.

It seems to be the established rule of the Federal Courts in this country, that several persons can not join together in one suit for the purpose of restraining the collection of taxes, as there is no common interest between the owners in the property assessed or in the tax. In all of these cases the Federal Courts discuss the question of there being no joint or unity of interest in the property to be affected by the tax. The reasoning of the courts in these cases are applicable to the one before the Court when in considering the question as to whether there is any community or joint interest between the defendants in error in the properties affected by these assessments which would not entitle them all to join in one suit.

Ex Parte Baltimore & O. R. Co. *supra.*
Ballard Paving Co. et al vs. Mulford et al. 100 U. S. 591, L. Ed.
Russell vs. Stansell, 105 U. S. 989, L. Ed.
Seaver vs. Bigelow, 5 Wall. 208.

Believing as we do that the above authorities are decisive of this case and clearly establishes the fact that the lower Court erred in overruling the plaintiffs' in error demurrer and rendering judgment in favor the de-

fendants in error, yet there is one other question which we desire to briefly present to the Court, as it was presented to and ruled upon by the Court below.

Third—As the second and third assignments of error set forth in our brief involve a discussion of the evidence we will consider them together. Did the Court err in deciding and adjudging that under the evidence said sewer assessments were not levied according to the benefits conferred upon complainants' property by reason of the construction of said sewer in said districts, and that said lots, blocks and tracts of property against which said assessments were made were not benefited to the amount of each assessment, and declaring said assessments void, of no legal force or effect?

A brief analysis of the evidence as disclosed by the agreed statement of facts shows that the City Council of Boise City received and accepted a petition in writing signed by more than a majority of the resident property owners in said Sewer Districts Two and Three, asking for the construction of said sewer; that notice was published in a daily newspaper in Boise City inviting proposals and bids for the laying of said sewer; that after the total cost of the construction of said sewer had been estimated and determined, and prior to the levy of said assessments, the City Council of said city caused notice of the intention of said council to levy a local or special assessment upon and against all property fronting or abutting upon or contiguous to that portion of said Sewer Districts Two and Three to be duly published in a daily newspaper once each day for ten days, specifying a time and place when and where the council would meet to receive, hear and determine any and all objections or complaints against said assessments or the levy thereof any owner of any said property might have to make; that said

meeting was duly held and a hearing was granted to all property owners in said districts to present any reason, complaint or objection why said sewer should not be constructed; that said complainants all had knowledge of said meeting prior to the holding of the same and did not appear or file any objection against the laying of said sewer or said levy; that prior to the levy of said assessment the City Council duly appointed a special committee, together with the City Engineer, to examine into the necessity of and the amount of benefit said sewer would be to said properties to be assessed, and said committee made their report to said council and the same was received and accepted by the Mayor and Council of said city; that in said report it was stated that it was, in the opinion of said engineer and special committee, necessary in the protection of the health of all persons residing in said city and it would be a benefit to each description of property in said districts to construct said sewer; that at said meeting said Mayor and Council considered and determined that all of said property would receive a benefit greater than the amount of said assessment by reason of the construction of said sewer; that the cost of said sewer was reasonable and could not have been laid at a lower cost unless at a loss; that said Sewer Districts Two and Three are situated in the thickly settled part of the residences of said city; that complainants' and other persons' homes are upon the properties against which said assessments were levied; that by reason of the construction of said sewer the values of said properties in said districts have been enhanced; that all of the property owners, except complainants in said districts, have paid to said city the amount of the assessments so levied against their properties. (Transcript, pp. 47 to 63 inc.)

As to the objection raised in paragraph nine in the complaint of the defendants in error, the same was denied in the answer of plaintiff in error, and there being no evidence offered establishing that fact, we deem it unnecessary to discuss the same as it was made an issue by the pleadings and no evidence is in the record upon that question. (Transcript, pp. 10 and 39.)

We earnestly insist that under the law governing the principles presented by the record in this case the judgment of the Court below is erroneous and should be reversed.

Respectfully submitted,

C. C. CAVANAH,

Solicitor and of Counsel for Plaintiff in Error.

No. 700

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

C. K. KING, AS ADMINISTRATOR OF THE ESTATE OF J. W. SMITH, DECEASED,

Plaintiff in Error,

vs.

CHARLES H. SMITH AND THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (A CORPORATION),

Defendants in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filmer-Rollins Co., Print., 424 Sansome St., S. F.

INDEX.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Complainant,
vs.
CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.

Complaint.

Comes now the plaintiff and complaining of the above-named defendants for cause of action alleges:

That said plaintiff is now, and at all the times hereinafter named was, a citizen of the State of Colorado, United States of America.

That the defendant, the California Safe Deposit and Trust Company, is and at all the times hereinafter named was a corporation duly incorporated and acting under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California.

That C. K. King is, and at all the times hereinafter named was, a citizen and resident of the State of California and a resident within the Northern District of California in the Ninth Circuit of the Circuit Court of the United States.

That heretofore, to wit, on the 16th day of November, 1895, J. W. Smith died a citizen and resident of the county of Alameda, State of California.

That afterwards, to wit, on the 9th day of December, 1895, an order was duly given, made and entered in the Superior Court in and for the County of Alameda, State of California, appointing C. K. King, administrator of the estate of said J. W. Smith, deceased; that afterwards, to wit, on the ——— day of December, 1895, said C. K. King duly qualified as such administrator and letters of administration were duly and regularly issued to him out of the said Superior Court; that said letters, so issued as aforesaid, have never been revoked, and said C. K. King at all the times hereinafter named was and now is the duly qualified and acting administrator of the estate of J. W. Smith, deceased.

That on the 26th day of September, 1900, said plaintiff was the owner and entitled to the possession of the following described personal property, to wit, one hundred and ninety (190) bonds of the California and Nevada Railroad Company, of the face value of one thousand dollars ($1,000) each, numbered 20 to 42, inclusive, 54 to 200, inclusive, and 206 to 225, inclusive; that said property is of the value of fifty thousand dollars.

That said defendants on said 26th day of September, 1900, were, and ever since have been in the possession of said personal property. That before the commencement of this action, to wit, on the 26th day of September, 1900, the plaintiff demanded of and from the defendants the possession of said personal property; but to deliver the

possession thereof the defendants refused and still refuse. That the said defendants still unlawfully withhold and detain the possession of said property from the possession of plaintiff to his damage in the sum of five dollars.

That the said C. K. King, as administrator of said estate claims that said property belongs to and is the property of the estate of J. W. Smith, deceased.

That said defendant, California Safe Deposit and Trust Company, claims to hold said property for said defendant C. K. King, as administrator of said estate. That the same has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff.

Wherefore, the plaintiff demands judgment against said defendants for the recovery of the possession of said personal property, or the sum of fifty thousand dollars, the value thereof, in case a delivery cannot be had, together with five dollars damages, and for costs of suit.

GALPIN & BOLTON,
Attorneys for Plaintiff.

[Endorsed]: Filed September 28th, 1900. Southard Hoffman, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY, and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.

Summons.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the City and County of San Francisco.

The President of the United States of America, Greeting, to California Safe Deposit and Trust Company (a Corporation) and C. K. King, as Administrator of the Estate of J. W. Smith, Deceased, Defendants.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take

judgment for any money or damages demanded in the Complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 28th day of September, in the year of our Lord one thousand nine hundred and of our independence the one hundred and twenty-fifth.

[Seal] SOUTHARD HOFFMAN,
Clerk.

United States Marshal's Office, }
Northern District of California. }

I hereby certify and return that I received the within writ of the 29th day of September, 1900, and personally served the same on the 29th day of Sept., 1900, upon C. K. King, as administrator of the estate of J. W. Smith, deceased by delivering to and leaving with C. K. King, as administrator of the estate of J. W. Smith, deceased, one of said defendants named therein personally at Oakland, county of Alameda in said district, a certified copy thereof, together with a copy of the complaint, certified to by plaintiff's attorneys attached thereto.

San Francisco, Sept. 29th, 1900.

JOHN H. SHINE,
United States Marshal.
By Geo. B. Burnham,
Office Deputy.

[Endorsed]: Filed Dec. 10, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Judicial Circuit and Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation) and C. K. KING, Administrator of the Estate of J. W. SMITH, Deceased.

Demurrer of Defendant C. K. King, etc.

The defendant, C. K. King, sued as administrator of the estate of J. W. Smith, deceased, demurs to the complaint in the above-entitled action on the following grounds:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint is uncertain in this, that the property involved in said action is not sufficiently described to enable the same to be identified from such description.

3. That said complaint is ambiguous in this, that it cannot be ascertained therefrom, whether said action is in claim and delivery of personal property, or an action to determine adverse claims to the title of the property involved therein.

4. That said complaint is uncertain for the reasons stated in the last preceding paragraph hereof.

Wherefore, this defendant prays to be hence dismissed with his costs herein incurred.

WHITWORTH & SHURTLEFF,
Attorneys for Defendant C. K. King.

CERTIFICATE.

We, the undersigned, attorneys and counsel for the defendant, C. K. King; sued as administrator of the estate of J. W. Smith, deceased, hereby certify that; in our opinion, the above and foregoing demurrer is well founded in point of law.

WHITWORTH & SHURTLEFF,
Attorneys for Defendant C. K. King.

CHAS. A. SHURTLEFF and
J. M. WHITWORTH
Of Counsel.

[Endorsed]: Filed October 29th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT & TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased.
Defendants.

Amended Complaint.

Comes now the plaintiff and makes and files his amended complaint, and complainant of the above-named defendant, for cause of action alleges:

That said plaintiff is now, and at all the times hereinafter named was, a citizen of the State of Colorado, United States of America.

That the defendant, the California Safe Deposit & Trust Company is, and at all the times hereinafter named was, a corporation duly incorporated and acting under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California.

That C. K. King is, and at all the times hereinafter named was a citizen and resident of the State of California and a resident within the Northern District of Cali-

fornia, in the Ninth Circuit of the Circuit Court of the United States.

That heretofore, to wit, on the 16th day of November, 1895, J. W. Smith died, a citizen and resident of the county of Alameda, State of California.

That afterwards, to wit, on the 9th day of December; 1895, an order was duly given, made and entered in the Superior Court in and for the County of Alameda, State of California, appointing C. K. King administrator of the estate of said J. W. Smith, deceased; that afterwards, to wit, on the ——— day of December, 1895, said C. K. King duly qualified as such administrator and letters of administration of said estate were duly and regularly issued to him out of the said Superior Court; that said letters, so issued as aforesaid have never been revoked, and said C. K. King, at all the times hereinafter named was and now is the duly qualified and acting administrator of the estate of J. W. Smith, deceased.

That on the 26th day of September, 1900, said plaintiff was, ever since has been, and still is the owner and entitled to the possession of the following described personal property, to wit: one hundred and ninety bonds of the California and Nevada Railroad Company, of the face value of one thousand dollars ($1,000) each, numbered twenty to forty-two, inclusive, fifty-four to two hundred, inclusive, and two hundred and six to two hundred and twenty-five, inclusive; said bonds being dated the 10th day of April, 1884, and being the same bonds delivered by the plaintiff to the defendant, California Safe Deposit and Trust Company.

That said property is of the value of fifty thousand ($50,000) dollars.

That said defendants, on the 26th day of September, 1900, were, and ever since have been, and now are in the possession of said personal property.

That before the commencement of this action, to wit, on the 26th day of September, 1900, the plaintiff demanded of and from the defendants the possession of said personal property, but to deliver the possession thereof, the defendants refused and still refuse; that the said defendants still unlawfully withhold and detain the possession of said property from the possession of the plaintiff, to his damage in the sum of five ($5) dollars.

That the said C. K. King, as administrator of said estate, claims that said property belongs to and is the property of the estate of J. W. Smith, deceased.

That said California Safe Deposit & Trust Company claims to hold said property for said defendant, C. K. King, as administrator of said estate; that said property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff.

Wherefore, the plaintiff demands judgment against said defendants for the recovery of the possession of said personal property or the sum of fifty thousand ($50,000) dollars, the value thereof, in case a delivery cannot be had, together with five ($5) dollars damages, and for costs of suit.

GALPIN and BOLTON,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco. } ss.

A. E. Bolton, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters he believes it to be true; that the said plaintiff is a non-resident of the State of California and absent from the State of California and from the city and county of San Francisco; that the attorneys for plaintiff are residents of the State of California; that affiant is a resident of the county of Alameda, State of California; that by reason of the absence of the said plaintiff from the place of residence of his said attorneys and from the State of California he is unable to verify this complaint; that said complaint is for that reason verified by affiant.

A. E. BOLTON.

Subscribed and sworn to before me this 22d day of November, 1900.

[Seal] GEORGE PATTISON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 22d, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT & TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.

Answer of C. K. King, as Administrator, etc.

C. K. King, administrator of the estate of J. W. Smith, deceased, one of the defendants in the above-entitled action, for his spearate answer to the amended complaint therein—

1. Denies upon and according to his information and belief, that the plaintiff is now or was at any of the times mentioned in the complaint a citizen of the State of Colorado, United States of America.

2. Denies that on the 26th day of September, 1900, the plaintiff was, or ever since has been or still is, or ever was, the owner or entitled to the possession of the personal property described in the complaint or any part or portion thereof.

3. Denies that said personal property is or ever was at any of the times mentioned in the complaint of the

value of $50,000, but alleges that the value thereof is much less than the said sum, but the precise value thereof this defendant does not know and therefore cannot state herein.

4. Denies that said defendants, or that this defendant, on the 26th day of September, 1900, were or ever were in the possession of said property or any part thereof; this defendant alleges on information and belief that the said J. W. Smith was, prior to and at the time of his death, the owner of the said personal property, and of the whole thereof, and that the estate of J. W. Smith, deceased, is now and at all times since the death of J. W. Smith, deceased, has been the owner of, and that this defendant, as the administrator of the estate of said deceased, is and at all times mentioned in said complaint has been entitled to the possession of the said personal property and the whole thereof.

5. Denies that said defendants, or that this defendant, unlawfully withholds or detains the possession of the said property or any part thereof from the possession of the plaintiff, or that plaintiff is damaged in the sum of $5.00 or any sum whatever.

6. As to the allegations in said complaint that the defendant, California Safe Deposit and Trust Company, claims to hold said property for said defendant C. K. King, as administrator of said estate of J. W. Smith, deceased, this defendant has no information or belief upon the subject sufficient to enable him to answer said allegation, and placing his denial on that ground, denies that said California Safe Deposit and Trust Company

claims to hold said property for said defendant C. K. King, as administrator of said estate or otherwise.

Wherefore, this defendant demands judgment against the plaintiff for his costs herein incurred, and for the delivery to the defendant as such administrator of the said property and the whole thereof.

WHITWORTH & SHURTLEFF,
Attorneys for Defendant C. K. King, Administrator.

State of California,
City and County of San Francisco. } ss.

C. K. King, being duly sworn deposes and says that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

C. K. KING.

Subscribed and sworn to before me this third (3d) day of December, 1900.

[Seal] ALFRED A. ENQUIST,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Service of the within answer admitted by copy this 2d day of December, 1900.

GALPIN & BOLTON,
Attys. for Plff.

Filed December 3d, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.

Answer of California Safe Deposit and Trust Co.

The defendant, California Safe Deposit and Trust Company, answering plaintiff's complaint, denies as follows:

This defendant has no information or belief sufficient to enable it to answer the allegation that on the 26th day of September, 1900, said plaintiff was, ever since has been and still is the owner and entitled to the possession of the personal property described in the complaint, and placing its denial upon that ground denies that on the 26th day of September, 1900, or ever, or at all, the plaintiff was the owner or entitled to the possession of said described personal property or any part thereof.

Denies that this defendant unlawfully withholds the possession of said property from this plaintiff, and denies that plaintiff has suffered any damage by reason of the acts complained of in said complaint.

Wherefore, defendant prays to be hence dismissed with its cost.

GUNNISON, BOOTH & BARTNETT,
Attorneys for Defendant, California Safe Deposit and Trust Company.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

E. E. Shotwell, being duly sworn, deposes and says that he is the secretary of the California Safe Deposit and Trust Company, a corporation defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

E. E. SHOTWELL.

Subscribed and sworn to before me this ——— day of March, A. D. 1901.

[Seal] SOUTHARD HOFFMAN,
Clerk United States Circuit Court.

[Endorsed]: Filed March 12, 1901. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH,
Defendants.

Stipulation Waiving Jury.

It is hereby stipulated and agreed that a jury may be and is waived in the above-entitled cause.

Dated March 12th, 1901.

GALPIN & BOLTON,
Attys. for Plff.

WHITWORTH & SHURTLEFF,
Attys. for Deft. King.

GUNNISON, BOOTH & BARTNETT,
Attys. for Deft. California Safe Deposit & Trust Co.

[Endorsed]: Filed March 12, 1901. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.

Findings of Fact.

The cause coming on regularly to be heard before the Court sitting without a jury, a trial by jury having been expressly waived by plaintiff and defendant, Messrs. Galpin & Bolton appearing for plaintiff, Messrs. Gunnison, Booth & Bartnett appearing for defendant California Safe Deposit & Trust Company, and Messrs. Whitworth & Shurtleff, and W. N. Cannon appearing as attorneys for the defendant C. K. King, oral and documentary evidence was introduced by said parties respectively, the cause was submitted to the Court for decision, the Court now finds the following facts:

1. The plaintiff at the time of the commencement of said action was and now is a citizen of the State of Colo-

rado, United States of America. That defendants then were and now are citizens of the State of California.

2. The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to possession of the property described in the complaint; and said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars ($47,500); the defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of the plaintiff.

3. At all said dates the defendant, the California Safe Deposit and Trust Company, did not claim, nor does it now claim to have, nor does it have any interest in said property except as bailee of plaintiff, but now withholds said property from the possession of plaintiff on the claim that it is property of defendant King, as administrator of the estate of J. W. Smith, deceased.

4. That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff.

CONCLUSION OF LAW.

That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possession thereof.

March 26th, 1901.

WM. W. MORROW,
Judge.

[Endorsed]: Filed March 26, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.
} No. 12,983.

Judgment on Findings.

This cause having come on regularly for trial upon the 12th day of March, 1901, being a day in the March, 1901, term of said Court, before the Court sitting without a

jury, a trial by jury having been waived by stipulation of the attorneys for the respective parties filed herein, Messrs. Galpin & Bolton, appearing for plaintiff, Messrs. Gunnison, Booth & Bartnett, appearing for defendant, California Safe Deposit and Trust Company, a corporation, and Messrs. Whitworth & Shurtleff and W. M. Cannon appearing for the defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, and the trial having been proceeded with upon the 13th, 14th and 15th days of March, 1901, and evidence, oral and documentary, upon behalf of plaintiff and upon behalf of the defendant King, as administrator etc., having been introduced, and the evidence having been closed, the cause was after arguments of the attorneys for plaintiff and said defendant King, submitted to the Court for consideration and decision.

And the Court, after due deliberation, having filed its findings in writing, and ordered that judgment be entered herein in accordance therewith and for costs;

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Charles H. Smith, plaintiff herein, do have and recover of and from The California Safe Deposit and Trust Company, a corporation, and C. K. King, as administrator of the estate of J. W. Smith, deceased, defendants herein (who unlawfully withhold the same), the possession of one hundred and ninety (190) bonds of the California and Nevada Railroad Company, a corporation, numbered as follows to wit: 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73,

74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, and 225, now in the possession of said defendants, or either of them.

And it is further considered and adjudged that said plaintiff, Charles H. Smith, recover from said defendants, California Safe Deposit and Trust Company, a corporation; and C. K. King, as administrator of the estate of J. W. Smith, deceased, his costs in this behalf expended, taxed at $.

Judgment entered March 26th, 1901.

SOUTHARD HOFFMAN,
Clerk.

I hereby certify the foregoing to be a full, true, and correct copy of an original judgment entered in the therein entitled cause.

Attest my hand and the seal of said Circuit Court, this 26th day of March, A. D. 1901.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed March 26, 1901. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

CHARLES H. SMITH
vs.
CALIFORNIA SAFE DEPOSIT AND TRUST CO., et al. } No. 12,983.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 26th day of March, 1901.

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed March 26, 1901. Southard Hoffman, Clerk. By W. B. Beaizley Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.
No. 12,983.

Opinion.

Action at law, for the recovery of certain railroad bonds.

Galpin & Bolton, Attorneys for Plaintiff.

Gunnison, Booth & Bartnett, Attorneys for Defendant California Safe Deposit & Trust Company.

Whitworth & Shurtleff and Wm. M. Cannon, Attorneys for Defendant C. K. King, as Administrator.

MORROW, Circuit Judge.—This is an action wherein the plaintiff, Charles H. Smith, a citizen of the State of Colorado, seeks to recover from the defendants 190 bonds of the California & Nevada Railroad Company, of the face value of $1,000 each.

It is alleged in the complaint that the defendants on the 26th day of September, 1900, were, and ever since have been, and now are, in the possession of the said property; that the defendant C. K. King claims the property as the administrator of the estate of J. W. Smith, deceased, and that the defendant California Safe Deposit & Trust Company claims to hold the bonds for the defendant King as such administrator.

The bonds in controversy are part of a lot of 304 bonds of the California & Nevada Railroad Company, each bond of the par value of $1,000. These bonds were originally issued by the California & Nevada Railroad Company in the year 1889, and 229 of the bonds were delivered by the company to J. W. Smith, the father of the plaintiff, in satisfaction of a certain contract relating to the building of a portion of the road. J. W. Smith also received an order upon the Central Trust Company of New York for 75 additional bonds, making a total of 304 bonds.

It appears that on March 15, 1893, J. W. Smith entered into an agreement with one J. S. Emery for the sale to the latter of the 304 bonds just described, for a stipulated price. This agreement provided for the payment of the sum stipulated in installments, the bonds being deposited during the existence of the contract in escrow with Abner Doble, of San Francisco, until the full payment should be made by Emery. This agreement was not carried out, and another agreement, dated October 24, 1893, was substituted, wherein J. W. Smith agreed to sell the bonds to F. M. Smith upon the terms therein provided. This agreement was for an option, to continue for one

year, and contained a provision for its extension for an additional year upon the same terms and conditions. The agreement contained in this second contract was not carried out during the first year, and it was accordingly extended for the additional year, and finally expired on October 24, 1895. Under this second contract the bonds were continued on deposit wtih Abner Doble in escrow to be delivered to F. M. Smith upon his compliance with the stipulations therein contained; otherwise Doble was to return the bonds to J. W. Smith or his legal representatives. It does not appear that F. M. Smith complied with the terms of the contract, and on October 24, 1895, the optional agreement with F. M. Smith having expired, the bonds were thereafter subject to the order of J. W. Smith.

It appears that in August, 1895, J. W. Smith, being at that time about eighty years of age and in feeble health, deemed it wise to distribute his property among his children. His reason for doing this was that litigation might be avoided in the distribution of his estate after his death. He accordingly, on August 14, 1895, executed deeds to certain separate parcels of real estate situated in this state and elsewhere, conveying the same to his different children, and it is claimed by the plaintiff that at this time his father gave him the bonds in question as part of his share of the property distributed, and executed and delivered to him a formal assignment of the same.

J. W. Smith died in Oakland on the 15th of November, 1895. The day before his death the plaintiff applied to Abner Doble for the 229 bonds on deposit with him, and

upon executing a receipt signed "J. W. Smith, by C. H. Smith," the bonds were delivered to the plaintiff and by him subsequently delivered to the California Safe Deposit & Trust Company, to hold under another agreement executed between C. H. Smith and A. A. Grant. After this deposit of the bonds, a demand was made by the plaintiff for their return. In the meantime C. K. King appears to have applied to the Safe Deposit Company for delivery of the bonds to him, as administrator of the estate of J. W. Smith. The Safe Deposit Company refused to deliver the bonds to plaintiff, and he instituted the present action.

There is no substantial conflict in the testimony in the case. The only question is as to whether it establishes the fact that prior to his death J. W. Smith gave the bonds in question to his son Charles H. Smith, the plaintiff.

The witness Abner Doble, referring to the receipt for the bonds, dated San Francisco, November 14, 1895, executed by Charles H. Smith and signed "J. W. Smith by C. H. Smith," when asked "How did you happen to deliver these bonds to Mr. Smith (referring to Charles H. Smith) upon this receipt?" replied: "I cannot remember distinctly, only I think my impression is, that Captain J. W. Smith had told me that the bonds belonged to Charley Smith, and to give them to him." In answer to the question, "How long before this occurrence had you seen J. W. Smith?" the witness replied: "It had only been a short time. I was over there to see him a short time before he died." Again, referring to a conversation be-

tween the witness and J. W. Smith, the witness said: "My impression is he told me that the bonds belonged to Charley, and to deliver them to him. I think that is why I did so. I think that conversation was the groundwork of my delivering the bonds to his son." The witness was asked if he remembered ever having received a written order from J. W. Smith. His answer was, "I don't remember ever getting any direct order from him. I delivered them on account of what he told me, that they belonged to his son; and when his son came for them, I delivered them."

This evidence, it seems to me, establishes the fact that Doble delivered the bonds to the plaintiff Charles H. Smith as his property, pursuant to the conversation of the witness with J. W. Smith. But, aside from this declaration, there is other testimony to the effect that J. W. Smith had given these bonds to his son Charles H. Smith.

The witness W. R. Thomas was the notary public who took the acknowledgments of J. W. Smith on the 14th of August, 1895, to certain deeds making conveyances to the children of the grantor. He was asked to state whether or not at any time when he visited J. W. Smith the latter made any statement about the disposition of his property. The witness answered that J. W. Smith said that he had deeded away all of his property, so that, in the event of his dying, there would be no trouble about his estate. The witness stated that prior to taking the acknowledgments to the deeds on August 14, 1895, Mr. Smith told him he was going to deed away all of his property before his death, and said to him, "I want you to

make out a lot of deeds for me. I am going to convey my property that way rather than make a will, because there is always a chance for litigation on a will." The witness says he seemed to be afraid that there would be litigation if he made a will, and proposed to distribute all his property before his death.

The witness C. K. King, administrator of the estate, and one of the defendants in this action, testified that he heard J. W. Smith talk about the disposition of his property. He mentions one of these conversations as having occurred in the summer of 1895, perhaps a month or two before J. W. Smith died, and that he told the witness that he had given his property away to his children. The witness did not know whether he said he had given all of it away, but knew that he said most of it, and thought he said that he had given his son C. H. Smith the railroad property; that he stated that he had given the railroad bonds to his son, and that this statement was made about two months before he died.

The witness G. W. Palmanteer, an Oakland banker, was acquainted with J. W. Smith in his lifetime. Smith was a customer of the bank of which the witness was manager. *Palmentier* testified that he had had conversations with J. W. Smith, in which the disposition of his property was referred to. The witness stated that he had called on Smith almost every day while he was sick, and they talked a great deal about the disposition of the property; that J. W. Smith told the witness that he did not own anything in the world; that he had disposed of everything; that he had turned over everything; that he

had made deeds of his property to his daughters, and had turned over the bonds of the California & Nevada Railroad Company to Charles H. Smith, his son. This witness appears to have had intimate relations with the deceased, and to have been familiar with his affairs. The deceased appears to have told the witness several times that he had disposed of his property. One of these conversations at least appears to have been after the execution of the deeds in August, 1895.

From all the foregoing testimony it appears that it was the purpose of J. W. Smith to distribute his estate and give these bonds to the plaintiff, and that he stated before his death that he had made such distribution. This testimony, coupled with the plaintiff's possession of the bonds prior to his father's death, indicates very clearly that prior to the death of J. W. Smith the latter transferred the title and possession of the bonds to his son Charles H. Smith, the plaintiff in this case.

The evidence on the other hand tending to show that these bonds really belonged to the estate of J. W. Smith, is found in the acts of ownership exercised by J. W. Smith during his lifetime, and in the character of the receipt executed by C. H. Smith on November 14, 1895, when he withdrew the bonds from deposit with Abner Doble, and the further fact that C. H. Smith did not present to Doble the formal assignment of the bonds executed by his father on August 14, 1895, as the evidence of his right to their possession. The receipt executed by C. H. Smith shows that he was receiving the bonds for his father, J. W. Smith. But this circumstance is not conclusive. As the

bonds were deposited by J. W. Smith, it was proper that Doble should require, as he did, that the receipt should be executed in the name of J. W. Smith.

The other evidence in the case upon which the defendants rely is the fact that the assignment in question is an object of suspicion. This assignment is in the handwriting of the plaintiff. The signature is that of J. W. Smith. The paper upon which it is written is not ordinary writing paper, but of inferior quality and unusual shape and size. Plaintiff testifies that his father, on the morning of the 14th day of August (the day on which he executed the deeds conveying real estate to his children), dictated to plaintiff the assignment, whereby he conveyed to plaintiff these bonds; that he took this piece of paper and asked plaintiff to write as he should dictate; that some time after the assignment was written, his father went to a desk in the room and signed the document, then giving it back to plaintiff. It seems remarkable that this assignment should have been executed upon a fragment of paper of this character. It appears that there was the usual character of writing paper in the room and on the desk, and no reason is given why paper of that character was not used. Expert testimony has been introduced tending to show that the signature to this assignment was written many years ago, and that the body of the assignment was written some time after the signature, indicating that the plaintiff has obtained his father's signature on a fragment of paper and has written the assignment over it. It is claimed that the

appearance of the paper and the writing tends to support this theory.

It appears further that although the question of ownership of these bonds had been in controversy in the Superior Court of Alameda County and before the master in chancery in this court in another action, the plaintiff has never produced this assignment in evidence until a few days before this trial commenced, when it was produced in an examination of the witness Palmanteer, whose deposition has been read upon this trial. Had this assignment been executed regularly and for the purpose of conveying the title to the bonds, there does not seem to be any reason why it should not have been produced whenever the title to this property was under consideration.

It does appear, however, that in the year 1898 the plaintiff did produce this assignment to W. R. Davis, one of the attorneys for the administrator, C. K. King. At that time a citation had been issued out of the Superior Court of Alameda County, directed to the administrator, requiring him to show cause why the bonds in the possession of the plaintiff should not be inventoried and appraised as part of the estate. The assignment was then considered by the attorneys as evidence that the bonds belonged to the plaintiff, but for some reason not clearly disclosed it was not presented in court in that behalf.

These features of the case certainly tend to raise a doubt as to plaintiff's claim that the bonds were assigned to him under the circumstances related in his testimony. But on the other hand, the defendants have introduced in evidence a letter written by the plaintiff on November

24, 1897, to W. R. Davis, one of the attorneys for the administrator, concerning a claim against the estate of J. W. Smith on account of certain notes executed by J. W. Smith to one Mary F. McSorley for a piece of mining property which Smith had purchased from her. After the death of J. W. Smith a Mr. A. J. McSorley called upon Charles H. Smith concerning the payment of these notes. The latter, as appears from his father, stated to McSorley that he thought the estate would have sufficient property out of which could be realized an amount sufficient to pay his claim in full, and all other claims, and probably leave a surplus. In this letter to Davis, in referring to this claim, the writer says:

"I also said to him at that time that I did not think he need give himself any uneasiness, as I felt that his claim would be paid. I believed so for various reasons. I was in hopes it would not be necessary to call upon any of the estate's assets to liquidate the claim of McSorley. I thought at that time that I would be able to dispose of some railroad bonds which my father had given me, and, in that event, it was my intention to pay all father's indebtedness and thereby clean up the whole matter, but at a time when I could have sold the bonds, and was at the point of delivering the same, some matters arose, especially that of litigation, and nothing can be done until this litigation is settled."

This statement made by Charles H. Smith in 1897 indicates that at that time he had no doubt as to his absolute right to the bonds as a gift from his father, and as this right does not appear to have been brought into question

until more than a year later, there is apparently some credit to be given to this declaration at that time, in connection with the attending circumstances.

It appears further that the relations between the father and son were cordial and to some extent at least confidential. It was the son who, under the direction of his father, drew up the deeds executed on August 14, 1895, conveying property to the other children; and there does not appear to have been any reason why the father at that time should not have distributed to the son such share of the estate as he wished the son to receive; indeed, there would be cause for surprise, if, under the circumstances, this had not been done.

Returning now to the testimony of the witnesses Doble, King, Palmanteer, and Thomas: This testimony is clear and positive that J. W. Smith intended to distribute his property to his children, and did so as to the real estate; that he intended to give the railroad bonds to his son, and the testimony is reasonably certain that he did so. These witnesses are all gentlemen of character, and their testimony has not been impeached or discredited in any way. This evidence cannot be rejected; and, giving it the consideration it is entitled to receive, the court arrives at the conclusion that the plaintiff has, under the law relating to gifts of property, established his ownership of the bonds and his right to recover possession thereof.

A judgment will therefore be entered in favor of the plaintiff.

[Endorsed] Filed March 25, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California.

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation) and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,

Defendants.

Bill of Exceptions.

Be it known that on the trial of the above-entitled cause before the Court, sitting without a jury, the jury having been waived by the parties, the following proceedings were had:

Mr. SHURTLEFF.—If your Honor, please, before proceeding with the trial, I wish to ask an order associating with us Mr. Wm. M. Cannon, as one of the attorneys for the defendant King, as administrator.

The COURT.—Very well.

E. E. SHOTWELL, called as a witness for the plaintiff, and being duly sworn, testified as follows:

My name is E. E. Shotwell. I reside in San Francisco, and am secretary of the California Safe Deposit and

Trust Company. I have been such secretary for seven years. I know the plaintiff, Charles H. Smith, and A. A. Grant. Mr. Smith deposited 290 bonds of $1,000 each with us in escrow, to be delivered to A. A. Grant upon certain conditions. Afterwards Mr. Smith gave us an order for the delivery of 100 bonds.

The order was thereupon produced by the witness and offered and admitted in evidence and marked Plaintiff's Exhibit "A," and said paper reads as follows:

Plaintiff's Exhibit "A."

"Denver, Colorado, March 16, 1900.

"The California Safe Deposit and Trust Co., San Francisco.

"Dear Sirs: Please deliver to A. A. Grant one hundred (100) of the highest numbered bonds of The California and Nevada Railroad Co., now in your possession for safekeeping, under a certain agreement dated June 14th, 1899, a copy of which you have, and oblige,

"Yours very truly,

"C. H. SMITH.

"Received from California Safe Deposit and Trust Company one hundred bonds of the California and Nevada Railroad Company for $1,000.00 each, numbered 226 250, inclusive, and Nos. 471 545, inclusive.

"A. A. GRANT."

The witness continuing testified: Our bank has the balance of the bonds numbered 190. They are the same bonds that were delivered to us by Charles H. Smith.

Counsel for plaintiff here produced a paper dated August 11th, 1900, which was offered and admitted in evidence and marked Plaintiff's Exhibit "B"; said paper reads as follows:

Plaintiff's Exhibit "B."

"Denver, Colorado, August 11, 1900.

"The California Safe Deposit & Trust Co., San Francisco, California.

"Dear Sirs: You will please deliver to A. A. Grant all of the bonds of the California & Nevada R. R. Co. deposited by me with your Co., and for which receipt was given by you to me dated July 17th, 1899. Mr. Grant will pay your fees in the premises.

"Respectfully yours,

"C. H. SMITH."

Counsel for plaintiff produced a paper dated July 17, 1899, which was offered and admitted in evidence and marked Plaintiff's Exhibit "C"; said paper reads as follows:

Plaintiff's Exhibit "C."

"San Francisco, July 17th, 1899,

"Received from Charles H. Smith, of Denver, two hundred and ninety thousand ($290,000) dollars of bonds of the California and Nevada Railroad Company, upon the following conditions, viz:

"Upon the payment by A. A. Grant, of Albuquerque, or his assigns, of the sum of five thousand ($5,000) dollars

on or before June 14th, 1899; and of seven thousand five hundred ($7,500) dollars on or before August 14th, 1899; and of seven thousand five hundred $7,500) dollars on or before October 14th, 1899; and of ten thousand ($10,000) dollars on or before December 14th, 1899, for account of Charles H. Smith, and upon the further delivery of one-fourth (1-4) of the issue of the new bonds of a new corporation to be formed as provided for in a certain agreement of June 14th, 1899, a copy of which is in our possession, and said issue and amount of bonds being subject to the approval of and satisfaction of Charles H. Smith on or before the first day of January, 1900, and also upon the delivery to us of a certificate from said Charles H. Smith to the effect that all the terms of a memorandum of agreement made and entered into on the fourteen day of June, 1899, by and between Charles H. Smith and Angus A. Grant, have been complied with, then said two hundred and ninety thousand ($290,000) dollars in bonds of the California and Nevada Railroad Company are to be delivered to Angus A. Grant, or his assigns, otherwise said bonds together with any payments made thereon to be delivered to Charles H. Smith, or in lieu of delivery of one-fourth (1-4) of the new issue of bonds, a payment of forty-nine thousand five hundred ($49,500) dollars to said Charles H. Smith.

"CALIFORNIA SAFE DEPOSIT AND TRUST CO.

"By E. E. S.,

"Secretary."

The witness continuing testified: The signature at the end of Plaintiff's Exhibit "C" is the signature of Mr. Grant. Mr. Smith made a demand upon us for the bonds. We still hold the bonds. We gave as a reason to Mr. Smith for not delivering the bonds to him at the time he made the demand for them, that Mr. King, the administrator of the estate of J. W. Smith, deceased, had made a demand upon us for those bonds on April 19, 1900. That paper was received by us. I rather think it came through the mail.

Counsel for plaintiff here offered the paper dated June 19, 1900, in evidence, which was admitted and marked Plaintiff's Exhibit "D," and reads as follows:

Plaintiff's Exhibit "D."

"902 Broadway, Oakland, Cal., June 19, 1900.

"Cal. Trust & Safe Deposit Co.

"Dear Sir: As administrator of the estate of the late Capt. J. W. Smith and having been ordered bp the Superior Court of Alameda County that 304 bonds of the California and Nevada R. R. Co. claimed by C. H. Smith, the son of the late Capt. J. W. Smith should be inventoried as part of the estate of the said Captain J. W. Smith and appraisers having been appointed by said Court for that purpose, I would ask that should any of said bonds and numbered as follows: 1-2-3-4 and 10 to 42, inclusive, and 54 to 200, inclusive, and 206 to 250, inclu-

sive, and 471 to 545, inclusive, be in your possession that you deliver said bonds to me as such administrator.

"Please answer.

"Yours truly,

"C. K. KING."

(Received Jun. 21, 1900.)

The witness continuing testified: The paper now shown me dated Oakland, California, June 16, 1900, was received by mail at our bank.

Counsel for plaintiff here offered said paper in evidence, which was admitted and marked Plaintiff's Exhibit "E," and reads as follows:

Plaintiff's Exhibit "E."

"Oakland, Cal., June 16, 1900.

"To the Calif. Safe Deposit Co., San Francisco, Cal.

"Dear Sirs: You will please advise me if you have in your possession any bonds of the California & Nevada R. R. Co. reputed to belong to Charles H. Smith.

"As per order of the Superior Court of Alameda County, I, as administrator of the estate of the late Captain J. W. Smith desire to obtain possession of said bonds and have them appraised as part of said estate appraisers having been appointed for that purpose by said Court.

"Yours truly,

"C. K. KING, Administrator,

"902 Broadway, Oakland, Cal."

(Received Jun. 18, 1900.)

The witness continuing testified: A demand for these bonds were made upon us by C. K. King, personally. Mr. Smith was told that we refused to deliver the bonds on account of having received this demand from Mr. King.

A. A. GRANT, called as a witness for plaintiff, being duly sworn, testified as follows:

My name is A. A. Grant. I am stopping in San Francisco. I know the plaintiff. I am the A. A. Grant of whom the witness has just testified as having gone to the California Safe Deposit and Trust Company with certain bonds of the California and Nevada Railroad Company. At the time I went there Charles H. Smith had the bonds in his possession. Subsequent to the delivery of these bonds I gave the California Safe Deposit and Trust Company directions to deliver the last 190 bonds which they *not have* to Mr. Smith. As to the value of the 190 bonds on the 18th day of September, 1900, I could not fix any true value of them. I should judge they were worth 25 per cent of the face value. I am familiar with the property and have been for many years. By the property I mean the railroad which was given to secure the bonds. I have had a few of these bonds since the last issue. I keep my mind on the property of course. When I say it is hard to fix the value of the property I mean that if it was put up at sale it is a question what it would bring. It would depend upon how it was handled. If the railroad was put up for sale, if conditions were not favorable it might not bring much, otherwise it might bring more. You cannot put an exact value on a thing of that kind.

Cross-Examination.

I purchased some of these bonds recently. I paid $65,000 for 290 bonds. Those are the bonds in controversy. I have practically paid for them. They are nearly all paid up for. I have paid $51,000 on them. These are the 290 bonds in controversy. Recently I brought suit in this court to recover these precise bonds. As to the value I have placed upon the bonds of 25 per cent of their face value there can be no certainty about that in view of the fact that the railroad is in litigation and in the hands of a receiver, that receiver certificates are outstanding and there is an uncertainty as to what the property will bring if sold. The value is dependent upon all these uncertainties.

Redirect Examination.

I had a contract with Mr. Smith for the purchase of these bonds prior to the agreement under which the deposit in escrow was made. One hundred of the bonds were delivered to me under the agreement with Mr. Charles Smith. It was in pursuance of that agreement that the bonds were delivered to the California Safe Deposit and Trust Company. I made a demand through my attorneys on the California Safe Deposit and Trust Company for those bonds. In compliance with the demand I received 100 of them. I subsequently made a demand for the last $190,000 of bonds. I did not get them. I understand the administrator, Mr. King put in an objection, claimed the bonds for the estate.

Counsel for plaintiff thereupon introduced in evidence a paper dated September 13, 1900, addressed to the California Safe Deposit and Trust Company, which was admitted and marked Plaintiff's Exhibit "F," and is as follows:

Plaintiff's Exhibit "F."

"September 13th, 1900.

"To the California Safe Deposit & Trust Co., San Francisco, Cala.

"Dear Sirs: Having refused to deliver to A. A. Grant, one hundred and ninety (190) bonds of the California and Nevada Railroad Company of the face value of one thousand dollars each, numbered from 20 to 42, inclusive, 54 to 200, inclusive, and 206 to 225, inclusive, deposited by me with your company for which receipt was given by you to me dated July 17th, 1899, pursuant to my request of August 11th, 1900.

"Now then, A. A. Grant consenting to this my request, I hereby demand from you that you return to me the aforesaid bonds.

"Respectfully,

"CHARLES H. SMITH.

"Witness: HENRY M. PORTER."

"September 13th, 1900.

"To the California Safe Deposit & Trust Co., San Francisco, Cala.

"Dear Sirs: Referring to the above request of C. H. Smith that you deliver to him the bonds of the California and Nevada Railroad Co. deposited with you and re-

ceipted for by you July 17th, 1899, I request that you deliver the same to Charles H. Smith as demanded in the above demands.

"Respectfully yours,

"A. A. GRANT."

The witness continuing testified: I paid $51,000 on the agreement. I paid no more money because some objections were raised by the administrator as to the title of the bonds. I had no further objections. If I could not get possession of them I naturally withdrew from paying. There is $14,000 due under our agreement, two $7,000 payments.

CHARLES H. SMITH, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

I am the plaintiff in this action and on the 28th day of September, 1900, was a citizen of Colorado.

Plaintiff rests.

J. S. EMERY, called as a witness for defendant King, being duly sworn, testified as follows:

I know the J. W. Smith of whose estate C. K. King, the defendant here, is the administrator. He was the father of Charles H. Smith, the plaintiff in this action. I know the one hundred and ninety bonds of the California and Nevada Railroad Company that are involved in this suit. I knew J. W. Smith about fifteen years and on and before the 15th day of March, 1893. It was twenty years ago, I think, when he came here, and over. I knew him shortly after he arrived in this state.

Q. I show you now, Mr. Emery, a memorandum of agreement and option dated the 15th day of March, 1893, and purporting to have been signed by J. W. Smith and J. S. Emery, yourself. Have you ever seen that document before?

A. Yes, I have seen that—that is my signature to that document, and that is the signature of J. W. Smith. The signature you now show me on the same instrument is the signature of Abner Doble.

Said document was here offered and admitted in evidence and marked Defendant's Exhibit No. 3, and in substance reads as follows:

Defendants' Exhibit No. 3.

"MEMORANDUM OF AGREEMENT AND OPTION.

"Made in triplicate this 15th day of March, 1893, by and between J. W. Smith of the city of Oakland, State of California, party of the first part, and J. S. Emery, of the same place, party of the second part:

"Witnesseth, that the party of the first part for and in consideration of the sum of $6,384 to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, does hereby give party of the second part, his heirs or assigns, an option to purchase 304 of the first mortgage bonds of the California & Nevada R. R. Co., a California corporation, for the sum of $212,800, up to and including September 15, 1893.

"Providing, however, that if the party of the second part, his heirs or assigns, so elect, this option will be extended for a second six months by the tender and pay-

ment of an additional $6,384 to party of first part thereafter on September 15th, 1893. Time, however, mentioned herein is the essence of this contract.

"On the execution of this contract and the payment of $6,384 the party of the first part will deposit with Abner Doble of the city and county of San Francisco, said 304 bonds hereinbefore mentioned to be held in escrow by said Abner Doble and to be kept in the safe deposit box rented for said purpose by parties hereto in the First National Bank. Said bonds to be delivered by said Abner Doble to J. S. Emery or his assigns if said J. S. Emery or his assigns shall comply with the terms and conditions of this agreement and option, but should said Emery or his assigns fail to make the payments or any one of them at the time specified, then on demand of said J. W. Smith or his legal representative, said Abner Doble shall deliver said 304 bonds to the said J. W. Smith, or his legal representative, and all payments theretofore made by party of the second part shall be forfeited as liquidated damages.

"In witness whereof, the parties have hereunto set their hands and seals in triplicate the day and year first above written.

"J. W. SMITH. [Seal]

"J. S. EMERY. [Seal.]

"Witness:

"H. L. SIMON.

"JOS. A. MURPHY.

"Abner Doble of San Francisco, California, hereby accepts the agreement hereinbefore set forth and signed by J. W. Smith and J. S. Emery, together with the 304 first mortgage bonds of the California and Nevada Railroad Company therein mentioned and agrees to deliver the same to said J. S. Emery, his heirs or assigns, if he shall comply with the stipulations herein contained, otherwise to return said bonds to J. W. Smith.

"Dated this 15th day of March, 1893.

"ABNER DOBLE."

The witness continuing, testified:

Q. I now show you a memorandum of agreement and option, dated the 24th day of October, 1893, and purporting to have been signed by J. W. Smith and F. M. Smith, and ask if you have seen that document before, and if you recognize the signatures of J. W. Smith and F. M. Smith?

A. Yes, sir, I do, and those are the signatures of the parties. The signatures to the right on the reverse page purporting to have been signed by J. W. Smith and F. M. Smith by Mr. Clough, his attorney in fact, were written by the persons whose names are there. I know all of their signatures. On the last page of this agreement appears a writing dated the 25th day of October, 1893, purporting to have been signed by Abner Doble That is Abner Doble's signature.

Said documents were thereupon admitted in evidence and marked Defendant's Exhibit No. 4, and in substance read as follows:

Defendants' Exhibit No. 4.

"Memorandum of agreement and option made October 24, 1893, between J. W. Smith, first party and F. M. Smith, second party, witnesseth: That first party for and in consideration of the sum of $12,220.70 to him in hand paid by two promissory notes aggregating said amounts, one of which is payable in six months and the other in twelve months, and both bearing six per cent interest. As additional consideration second party agrees to pay a monthly rental of $100 for a portion of block in Emeryville and also $366 cash additional for back rent, and in consideration of said cash and said two promissory notes first party gives second party an option to purchase 304 bonds of the California & Nevada Railroad Company for the sum of $212,000, payable at any time within one year from date hereof. If second party has fully complied with the part of this contract and desires that at the end of one year an extension, first party agrees to extend the option six or twelve months longer at the same price and on the same conditions. Time to be considered the essence of the contract. First party agrees to deposit said 304 bonds with Abner Doble, the said bonds to be kept by Abner Doble in the safe deposit box to be rented for said purpose by parties hereto, each paying half the box rent. If second party complies with the conditions of the agreement the bonds shall be delivered to him. Otherwise the bonds to be returned to first party on demand of J. W. Smith or his legal representatives. All payments heretofore made by second party shall be forfeited as

liquidated damages if second party fails to comply with the terms of the option.

"J. W. SMITH. [Seal]
"F. M. SMITH. [Seal]

"Witness:

"ALTON H. CLOUGH."

(On reverse page appears:)

"All of the conditions and terms of this contract having been fully complied with, the parties hereto hereby extend said contract and option twelve months from this twenty-fourth day of October, A. D. 1894, at the same price and on the same conditions specified therein.

"J. W. SMITH.
"F. M. SMITH.
"By ALTON H. CLOUGH,
"His Attorney In Fact."

(On last page of agreement appears):

"I, Abner Doble, of San Francisco, California, hereby accepts the agreement hereinbefore set forth and signed by J. W. Smith and F. M. Smith, both of Oakland City, Alameda county, California, together with three hundred and four (304) first mortgage bonds of the California & Nevada Railroad Company therein mentioned; and agree to deliver the same to said F. M. Smith, his heirs or assigns, if he shall comply with all the stipulations therein contained, otherwise to return the said bonds to said J. W. Smith or his legal representatives.

"Dated the twenty-fifth day of October, 1893.

"ABNER DOBLE."

The witness continuing testified:

Pursuant to the agreements just shown to me the bonds were placed in a box in the safe deposit under the First National Bank in a vault. I rented the box to deposit these bonds in under the escrow agreement. They were deposited in the name of Abner Doble. The bonds were in the possession of the company when they were issued and they were brought there to the office. I have seen all the bonds. They were given by the California and Nevada Railroad Company to Captain J. W. Smith for payment for work he had done on the road. At the time of making this agreement J. W. Smith still had possession of these bonds. He brought them forward and we put them in the box. They remained until Abner Doble turned them over to Charles H. Smith. I have seen them in the box several times. We went to the box there to cut coupons from them, I think. I cannot say how long before J. W. Smith died I saw the bonds there the last time. The safe deposit box was surrendered the day before Captain Smith died. He died November 15, 1895. I rented the box and used to pay the rent and then I would go and collect it, one-half from F. M. Smith and the other half from J. W. Smith. It was rented three years altogether, I think, or two and one-half years, or something like that. I have forgotten. I was well acquainted with J. W. Smith in his lifetime and for some time previous to his death had seen him very frequently. He had his office next door to my house and used to be there every day. For say six months prior to his death, I had seen him probably once a week or

oftener. I remember of the time of his becoming ill in his last sickness. I saw him three or four days before his death and prior to that time had seen him frequently for twenty years or so.

Q. State whether or not, in your opinion, Mr. J. W. Smith at the time you saw him last, two or three days before his death, was or was not of sound mind?

A. He was a very sick man and a prejudiced man. He would not have a doctor. I wanted him to have a physician, and he would not have one. He believed in Christian Science, and said it is just as a person believes, if he believes it won't hurt him to cut his arm off, it won't hurt him. Those were his very expressions as he lay there on the bed and didn't seem to realize his condition at all. He was in bed at that time. He was certainly a sick man; he appeared so. His looks showed it. He believed in Christain Science, and he wrote me letters to have certain believers in that come to see a daughter of mine who was very sick, to which I did not pay any attention. The writing of this letter does have reference to two or three days before his death. It was before that. I have told you he was a very sick man lying there, and his whole appearance indicated it. He had been a believer in Christian Science for, I guess, four or five years. He used to talk to me a great deal about it. I wanted him to have a physician and to get a physician to come in there and he would not have it. He was of sound mind always when he was well. It may have been four days or a week before his death the last time I saw him.

Q. Just confine yourself to the last interview there and as to what his condition was at that time?

A. His condition was, he was lying there and he was not able to sit up; lying in bed. At this time he was not of sound mind in my opinion. I think a man of sound mind, as sick as he was, would take advice of friends that were well and have a physician to attend to him. I did not converse with him on general topics at that last interview. I talked more on his condition than anything else. He was very sick. He had lost his strength a good deal, and his appetite had gone too, I guess. His looks indicated he was a very sick man.

Cross-Examination.

The last time I saw the bonds they were in that box at the safe deposit. They have a safe deposit vault under the National Bank on the corner of Bush and Sansome strets. I went there once with Captain Smith to cut coupons off from them. That was some time after they were put in there, but I can't tell you how long. I know nothing of my own knowledge as to how or by whom the bonds were taken out of that box. I don't think Captain Smith was sick to be in bed more than two or three weeks. He was in his room and would walk out occasionally. He was quite a Bible student and a man of considerable reading and learning, and of bright active mind. I think he was about eighty years old when he died—seventy-nine or eighty. He did not believe that if you cut a man's arm off that it would give him pain, if he only thought it would not; he said it was

all in the imagination. I don't know that he was clear minded when he died, he might have been clear but he was a very sick man. So far as I know, no physician attended him at all, but I understood there was one came afterwards. I don't know the nature of his disease. The last time I was there I had a conversation with him, and he recognized me when I went there. I asked him why he did not have a physician—if he would not have one. He had a Mrs. Somebody there, some woman who was doing something. He did not talk very much; he was very weak. He refused to have a physician.

Redirect Examination.

He did not talk much at that time. He was very weak; he could not talk. I stopped there probably half an hour or may be an hour. I could not tell you how many times he spoke during that time.

Q. Did he speak other than when spoken to directly?

A. Not very much; he was in a good deal of pain.

J. J. SCRIVNER, called as a witness for defendant King, being duly sworn, testified as follows:

I knew J. W. Smith in his lifetime. I knew that there were 304 or more bonds issued to J. W. Smith. If you would give me the numbers of the bonds I could probably identify them.

The COURT.—Numbers 20 to 42, inclusive, 54 to 200, inclusive, and 206 to 225, inclusive.

Mr. CANNON.—Q. And being dated on the 10th day of April, 1884?

A. Yes, sir, those bonds were issued to J. W. Smith. And delivered to him.

T. C. JUDKINS, called as a witness for defendant King, and being duly sworn, testified as follows:

Q. Mr. Judkins, I show you a paper headed "Abner Doble, Company, Importer, Dealer and Manufacturer in Iron, Steel and Metals," and ask you if you recognize that document.

A. Yes, sir, I do. This is a copy of a receipt, the original of which was introduced by myself, representing certain defendants in a hearing before Judge Heacock, master in chancery, in the case of Central Trust Company vs. California and Nevada Railroad Co. et al. The original was produced and put in evidence, and, at my request, the master permitted a copy to be substituted for the original and I took the original. I have had the original in my possession up to about ten days ago, but I have searched diligently since then and have not been able to find it. It is my habit to take home papers on Saturday evening and run over the papers Sunday morning, and, knowing this matter was coming up, I remember seeing the original among the other papers, and whether I took it from them and mislaid it there or at the office, I am unable to say. I have made a diligent search for that paper. The paper shown me and which I now hold is a copy that was left with the master in place of the original. Both documents were left with the master, and that is the master's exhibit mark, his own mark on the back of it. After the copy was compared the master handed it back to me;

probably it was two or three days after when I went back after it. I am well acquainted with Charles H. Smith. I have known him about a year and a half and know his handwriting. I have had correspondence with him and have seen his handwriting frequently. I know his signature. The words "J. W. Smith, by C. H. Smith," at the end of the original receipt were in his handwrit-writing.

(Counsel for defendants thereupon offered the said document in evidence.)

On cross-examination by plaintiff's counsel, the witness testified:

I keep exhibits in my desk. I have a roller-top desk and those exhibits were in a small box in which the powers of attorney from the heirs were kept. This exhibit was kept there most all of the time. I saw it a week ago—last Saturday in my office. I was sitting at my desk where I usually sit. The paper was in front of me on my desk. Whether I put it among the papers that I took home with me or whether I put it among the other papers on the desk, I know not. I have never seen it since that hour. I did not miss any other papers, and I regarded it as one of the most important documents there was among the papers there.

Q. Can you account for the fact for this one being gone and none of the others.

A. In general, I think it was because I was too careful about it. I remember of thinking, as I took the papers home, whether or not, knowing it would come up, it was safe or unsafe to take it in my valise. I gen-

erally take a small valise with a large number of papers home, and I questioned in my mind about the advisability of taking it home. My intention was, I think, not to take it; I had the copy which I had in my office, and I took the copy home with me, as there was no special necessity of having the original. After that hour, late on Saturday, at 1 o'clock, I have not seen the original.

Counsel for defendants thereupon renewed their offer of the document in evidence, and it was thereupon admitted in evidence and marked Defendants' Exhibit No. 5, and is as follows:

Defendants' Exhibit No. 5.

"THE ABNER DOBLE COMPANY.

"Importer, Dealer and Manufacturer in Iron, Steel and Metals,

"13 and 15 Fremont Street, San Francisco, Cal.

"San Francisco, November 14, 1895.

"Received from Abner Doble two hundred and twenty-nine (229) bonds of the California & Nevada Railroad Company, which with the seventy-five (75) bonds of said company ordered from New York, will make three hundred and four (304) bonds of said company—said 304 bonds having been left by J. W. Smith with said Doble as trustee.

"J. W. SMITH,
"By C. H. Smith."

Later in the trial the original document was found by Mr. Judkins and offered and admitted in evidence and marked Defendant's Exhibit No. 21, and is in the words and figures above set forth.

C. K. KING, the defendant, called as a witness in his own behalf, and being duly sworn testified as follows:

I am one of the defendants in this action and am the administrator of the estate of J. W. Smith, deceased. I knew J. W. Smith in his lifetime for ten or twelve years. I was employed by him. Within six months before his death I saw him as often as perhaps once every two days and part of the time once every day and sometimes twice a day. I know Charles H. Smith, the plaintiff. I remember the time of J. W. Smith's death. I was not there when he died. He died at Mrs. Stewart's rooming-house on 13th street in Oakland, between Broadway and Franklin. Charles H. Smith arrived in Oakland shortly previous to J. W. Smith's death, maybe three or four days before, or something like that. He came from Denver. Between the time of Charles H. Smith's arrival and J. W. Smith's death, I should say I saw J. W. Smith every day. He was a sick man lying on the bed. He could not get up at that time. I had no conversation with him for two or three days previous to his death. He did not seem to want to talk to anyone. I think he recognized his son when he came and said "Charlie," or something like that. I did not hear him talk to him at all, but for two days anyhow before his death, he lay on the bed with a handerchief over his eyes whenever I was there, and didn't seem to want to talk. I had no

conversation with him. I think I said to him when his son arrived, "Here is Charlie come to see you," or something like that. That is the only thing; he never answered me. I had been with him for some months previous to that; that is, not regularly. I was a friend of his and he wanted me to come in and attend to him, and when I went down to business in the morning I called in. I am a real estate agent. I had been accustomed to calling in upon him mornings and evenings as well. Mornings when I went down and evenings when I went home. Sometimes I would remain only a few moments, and sometimes half an hour. When I first commenced calling upon him he was moving about. He took his meals at the table in his room, and went from the bed to the table with the aid of a chair. That was about six months before his death. I should judge he was sick five or six months. For four or five months he would get to the table by the use of a chair. He was confined absolutely to his bed about a couple of weeks, or a week, not so long as a couple of weeks. The last time I had any conversation with him he talked to me rationally the same as he always did. He never at any time before his death talked to me in an irrational manner. For three or four days before his death he did not seem to want to talk to anyone, and I did not bother him. He had a man nurse there. So far as I know, he was of sound mind, I could not say he was of unsound mind at all. No part of the conversation I had with him indicated an irrational statement. I could not judge whether he was in a stupor or not. I went several times

into the room where he lay on the bed with a wet handkerchief over his eyes, and I saw that he was either sleeping or perhaps did not want to be disturbed, and I spoke to his nurse and I then went out without saying anything to him many times. I do not think I spoke to him and received an answer within two days before his death. I would sometimes go into the room, and he would be lying there with a handkerchief over his face. I noticed that several times, and I made up my mind that he was failing and was a very sick man and would not last long. I did not see him converse with anybody within two or three days before his death. I did not see him speak to anybody or answer anybody's questions. So far as I know, I never saw Mr. Smith engage in talking with anybody or answer questions of anybody after Charles H. Smith came there except the time he said "Charlie."

Cross-Examination.

I was there only a small portion of the time after Charles H. Smith came. I may not have gone in every day and I may. Maybe there was a day that I did not call at all, or two days, I do not know. I do not remember of being fifteen minutes at a time after Charlie came. I talked with the old gentleman in his lifetime about his affairs.

CHARLES H. SMITH, the plaintiff, called as a witness for defendant King, and being duly sworn, testified as follows:

I am the plaintiff in this action. I think I arrived in Oakland about five days before my father died. That would be on or about the tenth. I must have left Denver two days previous to that. I left Denver on the afternoon of November 9, 1895. That would bring me here on the evening of the 11th about 6 o'clock, or sometime in the afternoon. From the time of my arrival in Oakland up to the time of my father's death, I was with him most of the time.

Mrs. WLLIAM STEWART, called as a witness for defendant King, and being duly sworn, testified as follows:

I reside at 408 13th street, Oakland, and have resided there seventeen years. I knew J. W. Smith in his lifetime, and had known him about seven years. I had know him at the home of my mother in law, Mrs. Mary Stewart. He lived there and died there. I knew him well for a few months immediately preceding his death and saw him frequently. I brought him his meals for two months when he first took to his bed; then I went away for two months and returned. My mother took care of him then. I returned the 1st of November; he died on the 15th. I was away two months prior to the first of November. He was taken ill on the 15th of June, 1895. Between that time and the time I went away I took him his meals. He had throat trouble. He seemed to be bothered a good deal with swallowing. He did not complain, but seemed unable to assist himself. He was not able to go about the house unassisted. He had a cane or a chair from his bed to his table in the same

room; that was about all. He appeared to be very weak bodily. That condition seemed to be growing worse up to the time I went away. I do not know of his having left his room after being taken ill on the 15th of June, up to the time I went away. When I returned I found him very poorly, in bed. After that he never to my knowledge remained up. Mr. Cunningham took charge of him. I then did not enter only to visit or with mother. After that I entered the room once a day, sometimes twice. Not oftener. Not unless I went to bring something to the door or to step in. I conversed with him a little between the first of November and the 15th. He did not seem to talk so much as before. He seemed very helpless. The nurse had to assist him and also his son after that. He grew weaker each day and remained in bed. His head was placed to the door at the foot of the bed, near the very edge of the bed. That was the way he seemed to fix himself before he got unable to help himself. He never said anything about that change that I know of. He was never changed back. The last conversation I had with him was on the first day of November, when I returned. I had quite a little talk with him then. After that I would just ask him how he felt and how he was getting along Sometimes he would say about the same. I do not think he spoke anything in the last four days. He seemed to be unconscious. I did not speak to him. I saw he was very quiet. I do not think the last four days he was very conscious. He did not appear to be conscious of his surroundings and people who were in the room, in the last two days. No, sir; he was not conscious during the last two days.

Cross-Examination.

I was at my mother's residence on June 15th. I know that was the day that Mr. J. W. Smith took sick because he called me to get him something to eat. My mother was away and it was on Sunday. I was very busy and had charge of the house while she was away. I know it was five months from the day he went to bed that he died, on the 15th. He said he was unable to get something to eat and would I bring him something. I said yes. From that time I furnished meals to him or my mother in law did until I went away. During that time he was alone, had no attendant and kept to his room. He seemed to be troubled with his throat. I returned on the 1st of November, and some one was taking care of him. I known who that person was, but do not know how he came to be there. I had a conversation with J. W. Smith. He asked me if I had a pleasant trip. I told him I had. He seemed to be pleased and seemed to comprehend the question fully, and asked me the particular parts of the country south where I was. From that time I had occasion to go to his room only when I brought some fresh water or if mother sent me with something. I had very little occasion to go there by reason of the fact that he had an attendant. I do not think the attendant was quite two weeks with him—in the neighborhood of two weeks. He went away as soon as Mr. Smith died. After the conversation when I returned I always asked him how he felt, and he would say about the same. Along the last few days he got quieter and seemed to be drowsy. I made no effort to rouse

him—there were others in the room. When I went into the room he would apparently be asleep or quiet. I never heard any people make any effort to talk to him during the last two days. I made no effort to talk to him—he was in a stupor. He was not able to converse with people because he had not spoken for a few days before. I went in and looked at him. He did not recognize any one seemingly in his room the day before he died. The second day prior to his death I was in his room probably ten minutes—I was in once ten minutes. Mother asked me to come up and see him if I wanted to see him; she thought he was dying. I went up to see him on that statment—had no other business in the room. He was not able to speak. He did not seem to recognize me at all. I did not speak to him, I spoke to mother. Mother and I talked and stood by the side of him. No one spoke to him while I was there. The day of his death I don't think I was longer there at any time than ten minutes. I did not sit down. The last time I was there about ten minutes, never longer. I heard no one speak to him that day because he was dying. I did not speak to him. His son was not there. James Cunningham and Mrs. Stewart, my mother in law, were present. No one else. That was on the last day. I was not there when he died. He died about three hours afterwards, I guess. What I have stated is all that I know which leads me to believe he was unconscious.

Redirect Examination.

Q. Was there anything in the illness of your baby which connected or fixed this date in your mind?

A. Yes, sir; my baby was sick. The captain thought a great deal of the baby and said she was not sick at all. She had spine trouble, and I went away for her health. She died ten days after he died. She died on the twenty-fifth and he died on the fifteenth. He was taken sick in June just before he was taken sick, about the first of June. Captain Smith died in the forenoon of the fifteenth of November, I think it was between ten and eleven o'clock—in that neighborhood.

ABNER DOBLE called as a witness for defendant King, and being duly sworn testified as follows:

I live in Oakland. I knew J. W. Smith in his lifetime. I knew him for a number of years but I don't remember how many—four or five years. I was a director of the California and Nevada Railroad Company. I remember 304 bonds of that railroad which were delivered to Capt. J. W. Smith in his lifetime. I remember of those bonds having been placed in escrow pursuant to certain escrow agreements between J. W. Smith and J. S. Emery in the first place and F. M. Smith afterwards. These bonds were placed with me. I took possession of part of them. Some of them were in New York and were not brought out here. I cannot call to mind exactly how many of them were in New York. It was less than one hundred. I don't remember now. I had an order for the bonds.

They were in New York. Those bonds that were here I took possession of and put in the safe deposit.

Q. And the order on the Central Trust Company for the bonds. Did you take charge of that also?

A. I think I did, but I don't call it to my mind. I placed the bonds in the Safe Deposit Company at the corner of Sansome and Bush streets.

Q. The First National Bank? A. Yes, sir.

I cannot call to mind how long those bonds remained in my possession or in the safe deposit vault. They remained there for sometime, though.

Q. Do you remember when Captain J. W. Smith died?

A. Yes, sir.

Q. With reference to the time of the option in the agreement, state whether or not they remained in your possession until after the last extension on that agreement expired?

A. I do not remember. I do not call to mind. The agreement would be the best evidence. I do not know.

Q. I show you now an option contract being Defendant King's Exhibit No. 3 and a receipt at the end of it and ask you to examine that with particular reference to the date (handing)? You have examined that?

A. Yes, sir, I notice my receipt there.

Q. I show you now a receipt attached to Defendant King's Exhibit No. 4, and ask you to examine that (handing.) A. Yes, sir, that is my signature.

Q. And also an extension there extending the terms of the contract twelve months from the 24th day of October, 1894. Do you remember that?

A. I do not clearly remember that, although it seems like something that I know, but I cannot identify it exactly. I cannot say that these bonds remained in my possession until after the expiration of that option. They remained in my possession until I delivered them to Charles Smith, but I cannot fix the date.

Q. You cannot fix the date at all?

A. No, sir, I cannot fix the dates of that time.

Q. Then they were in your possession, you remember, from the time they were first placed in your possession pursuant to this option contract until you delivered them to Charles H. Smith? A. Yes, sir.

Q. I show you now Mr. Doble what purports to be a copy of a receipt given by Charles H. Smith to you at the time you delivered the bonds to him. It does not purport to be an original receipt but merely a copy of it. Examine it. (Witness was here shown Defendant King's Exhibit No. 21.)

A. Yes, sir, that is correct, I think that is all right.

Q. State as fully as you can the circumstances under which you delivered these bonds to Charles H. Smith. Can you state the circumstances?

A. Nothing more.

Q. What happened between you and Mr. Smith when he came to you if he did come, to get the bonds?

A. When Mr. Smith called for the bonds I delivered them to him. They were in the Safe Deposit Building. We went up to the building and I delivered him the bonds there. Except the seventy-five that were in New York. I think I gave him a receipt for them, to get

them. He got them afterwards. We had to send to New York for the seventy-five bonds.

Q. That was sometime afterwards?

A. I cannot tell.

Q. At the time of the delivery of these bonds by you to Charles H. Smith was any document of any sort presented to you by him?

A. Not that I remember of; only simply a receipt for the bonds.

Q. What do you mean by a "receipt for the bonds"?

A. That he had received the bonds from me.

Q. Is that the receipt a copy of which I have just shown you?

A. Yes, sir; no other paper was produced by him at that time that I remember of.

In answer to questions by the Court, the witness testified:

I knew Mr. Charles H. Smith some two or three years before this time. I knew him as a son of J. W. Smith. I had not seen him very often during that time. He did not come here often, he lived at Denver, and I only saw him a few times. I cannot remember distinctly how I happened to deliver these bonds to Mr. Smith upon this receipt, only I think, my impression is, that Captain J. W. Smith told me that the bonds belonged to Charlie Smith and to give them to him. I had seen J. W. Smith a short time before this occurrence. I was over there to see him a short time before he died. He was sick in bed. I saw him in his room. I did not talk much with him about his business at that time. He was not in a

condition to talk much and I did not talk with him much. What he did talk I cannot recall to mind.

The COURT.—Q. But you say you remember you had some talk with him at that time about these bonds?

A. My impression is that he told me that the bonds belonged to Charlie, and to deliver them to him. I think that is why I did so. I think that conversation was the ground work of my delivering the bonds to his son.

Q. Mr. Doble, you are a business man of experience?

A. I have been in business a good while.

Q. And you are accustomed to transact business in a business way? A. Yes, sir, I try to.

Q. Ordinarily, you would not deliver over property to a person unless the owner should come for it, or should give some order to you, if you were the bailee or holder of the property, would you? A. No, sir.

Q. Now, in this case you had no written order from J. W. Smith? A. None that I know of.

Q. You do not remember ever having seen one?

A. I don't remember ever getting any direct order from him. I delivered them on account of what he told me, that they belonged to his son, and when his son came for them I delivered them.

Q. Do you remember the incident of the son coming for these bonds?

A. Yes, sir. At that time I was in our shop on Fremont street in my office. I don't remember what he said to me on that occasion. I know he and I went to the Safe Deposit and got the bonds and I delivered them to him. I think he gave me the receipt in our office. He

did not bring the receipt with him, it was written out in our office. It was written on the typewriter, one of ours. I think I dictated the receipt. I am not sure because I do not remember the circumstance. I remember it is printed on one of our letter heads, and printed in our office. The details I do not call to mind.

Q. Does the circumstance that it is printed on your letterhead furnish you the information you are now giving, or do you remember it as an independent fact that you dictated the receipt?

A. From looking at the receipt now, and it being on our letterhead, I come to that conclusion.

Q. You do not recall the incident independent of that?

A. I do not clearly, and I have a recollection of it, too. It is not clear. Taking it all together, I take that to be the true condition of it.

Mr. CANNON.—Q. Mr. Doble, I show you the name at the end of the receipt, and call your attention to "J. W. Smith by C. H. Smith." A. Yes, sir.

Q. Can you state how that signature happened to be made in that way?

A. The bonds having been delivered to me by Captain J. W. Smith and then delivered to his son C. H. Smith, it was put on as a matter of reference or for recollection, more than anything that I know of. I held the bonds as the bonds of J. W. Smith and Mr. Emery together. That is my recollection concerning it.

The COURT.—Q. Did you ask Mr. Charles Smith as to what his father's health was at this time?

A. Yes, sir; his father was sick. He was sick. I did not know how bad he was, but he was sick. He died one or two days afterwards. Charles H. Smith had not come to this State a great while from Colorado. He had been here a short while. I learned that at the time of that transaction.

Q. You learned that at the time of this transaction?

A. Yes, sir, Charles Smith was there when I talked with him.

Q. Did he not tell you that his father was very sick and would not live long?

A. He had been sick a good deal, and we would not have been surprised to hear at any time of his passing over. I did not know how bad he was, whether it was more than a slight attack, or not; only that he was a man along in years, and he was dangerously sick.

Mr. CANNON.—How old a man are you?

A. I am seventy-one years old. For the last year or so I have not been very well. I got hurt and I have not been very well. I was hurt by a railroad car. I was knocked down.

Q. Has that effected your memory in any way, do you know?

A. I find that I forget things often; my memory is not as good as it was before I was hurt, still I remember things pretty well, too.

Defendants rest.

Deposition of W. G. Palmanteer.

Deposition of W. G. Palmanteer, of the city of Oakland, county of Alameda, State of California, a witness for plaintiff in rebuttal which had been taken upon stipulation between the parties to this action, and filed with the clerk of this court. Messrs. Galpin & Bolton appearing for plaintiff, and Messrs. Whitworth & Shurtleff, and W. M. Cannon, appearing for defendant C. K. King, administrator of the estate of J. W. Smith, deceased, at the taking of said deposition was then read to the Court, and the said W. G. Palmanteer after being duly sworn testified as follows:

My name is W. G. Palmanteer. My age is 45 years. I live in Oakland. I am in the banking business and manager of the Central Bank of Oakland. I have been connected with the bank since its organization in 1891. I became acquainted with the plaintiff Charles H. Smith in about 1894 or 1895. I know the defendant C. K. King and have known him for about the same time. I knew J. W. Smith in his lifetime. He resided during the latter years of his life in Oakland. I have been acquainted with him since before starting the bank in 1890. He began to do business with this bank along in 1891 or 1892. He used to come in the bank before that; before we opened an account with him. He would talk about his business and finally commenced to change his account from one of the other banks to this one and we gradually got most of his business here. He continued his business with the bank up to the time of his death. I remember

the fact of his death. He must have died about four years or so ago. He used to come in frequently and did a good deal of his writing here. I never had any business relation with him other than—only with the bank. I have had social relations with him, he used to come here and talk hours at a time, come in the evenings and would stay until ten or eleven o'clock at night. He talked to me a great deal about his mines, the California and Nevada Railroad, etc. He talked with me a great deal with reference to his business interests. I don't know that he had any confidential adviser in Oakland. He talked to me a good many times about the disposition of his property. He told me he had deeded to his daughters, and also at one time I remember he said, "Well, I don't own anything in the world; I have disposed of everything" and he told me that he had turned over, made deeds of the property to his daughter, and also that he had turned over the bonds of the California and Nevada Railroad to Charles H. Smith. This was one time when he sent for me and Mr. King. Mr. Smith lives here on 13th street at property owned by Mrs. Stewart. Mr. Smith roomed at this place kept and owned by the Stewarts. I think J. W. Smith only roomed there. I think it was a week or two weeks before J. W. Smith's death when Mr. King came and asked me to go and see Mr. Smith with him. I was busy at that time but went down soon afterwards. Mr. King was there when I arrived, and I think he went out before I did. As near as I can remember, J. W. Smith then said, "I don't own anything in the world. He said he had deeded his property away

and that he also turned over his bonds to C. H. Smith, and he also told me to deliver at one time, whether it was at that time or not, I do not remember, that he told me to deliver his box that he had in the bank to Charles H. Smith, although I had orders before Charles H. Smith came from Denver here, that if he should die—I had a written order here in the bank to deliver the box to Charles H. Smith. And he also told me at that time and after Charles H. Smith came to give the box to the latter, which I did. This was prior to J. W. Smith's death. The only bonds talked about were the California and Nevada bonds. I did not know of his owning any other bonds. Charles H. Smith was here before the summer of 1895, and stayed some little time and returned to Denver. J. W. Smith talked with me about the disposition of his property before and after Charles came. I know of no other deeds having been made other than what J. W. Smith told me. I think J. W. Smith talked with me as many as three times about having disposed of his property. I used to go up there every day or two while the old gentleman was sick. I don't remember how long he was sick, but it was three or four weeks that he did not get out. I think he wasn't well when Charles H. Smith made his first visit here that summer. J. W. Smith mentioned to me that Charlie talked something of moving out here entirely. He said Charlie's interests were large back there and that Charlie's wife did not want to come here and live. At the time of my visit to J. W. Smith when Mr. King came for me, the former said: "Life is uncertain and we don't know how long

we will remain here," or something to that effect, and said he wanted to talk to me. I think I was there the morning he died, or the evening before. The last time I was there he knew me. So far as Mr. Smith's mind was concerned, it was always all right when I saw him. I always considered his mind was clear and he was as bright as a dollar as far as I saw. I never talked with Mr. Smith except that I thought his mind was sound and all right. The box I referred to before was a pretty good-sized tin box, of a dark brown color, and was kept locked. The lettering on the box was "J. W. Smith." J. W. Smith first brought the box to the bank and it remained continuously here until finally taken away. I don't know where the box now is. When I saw it last Charles H. Smith had it. This was when the latter came and got it at the request of his father for me to give it to him. His father requested me to give it to him and when Mr. Smith came here I handed it to him. Charles Smith got the box in his possession before Mr. Smith died. I don't remember how long before, but only a short time. Prior to the death of J. W. Smith Charles had transactions with this bank, having had checks cashed here. Charles H. Smith deposited some money here; it was a collection on Denver, a draft or a check on Denver, I think. The amount was $2,000 or $2,500. (Here witness brought in the books of the bank and examined them.) I find from the books that the deposit was made on August 26, 1895, and the amount was $2,500. It was deposited to the account of C. H. or J. W. Smith. J. W. Smith could check against it. Both J. W. Smith and Charles talked with

me in the Stewart place about this deposit. I told him that he would have to give a check to C. H. Smith and that the money would have to be drawn out before his death or I would consider that it would have to be probated upon. That was after the deposit of $2,500. J. W. Smith had an open account with the bank before this. The conversation just referred to was in the presence of J. W. and Charles Smith, and I also had a talk with the former when Charles was not present. I think we had a talk with Mr. J. W. Smith when Mr. Smith was out here; that is the time he came when his father died. I don't know that I ever saw any instrument or paper signed by Mr. Smith relating to the disposition of his property. He had a paper here that he had left with me about whom to deliver the box to and anything that I had here, and what he wanted to be done; that is, he wanted to be buried, but just the wording of which I don't recollect. I think I saw some deeds to property, but I never looked over them to my remembrance. J. W. Smith had some in his own hand, but I never looked them over. The old gentleman was sick longer than I first thought; but I think at one time he had some deeds and he said he disposed of it, but I didn't look at the deeds.

Cross-Examination.

I remember that J. W. Smith talked with me two or three times about the disposition of his property. The first conversation was something like two or three weeks before C. H. Smith came from Denver, and also after C. H. Smith came he talked to me about it. I cannot re-

call the date of the first conversation. I know Mr. King came for me some time before Mr. Smith's death. But just how long before I don't know. I don't think the first conversation was not more than a month before his death. Before that he had talked in a minor way to me about the disposition of his property, about his daughters and the different interests, etc. They were not formal conversations and did not impress themselves upon my mind. I think that the first formal conversation occurred within a month of his death. I think that J. W. Smith was up there alone when he first talked to me about it, and the next time Mr. King came, I think, after me. This occurred in his room on 13th street. I don't remember the circumstances of the first conversation, because he didn't call me there. I wasn't there for that purpose; I was there to see how he was. He told me he calculated that Mr. Smith would have the California & Nevada Railroad or the bonds, Mr. C. H. Smith, and I think it was then that he talked to me about giving his daughters some real estate and property, but not as fully as he did when Mr. King came. I cannot recollect the exact language, but as near as I can recollect he calculated that Charles H. Smith had the bonds, or they were his, or they belonged to Charlie, or that he had given them to him already, and I think that he had disposed of them. I wouldn't attempt to state just what he said. I think the next conversation was some couple of weeks before his death, when Mr. King came for me, but it might not have been more than a week. This conversation in part was in the presence of Mr. King. As near as I can state, J. W. Smith said, "Life is uncertain

and we don't know how long we will remain here," or something of that kind, and then he said, "I have made deeds to my property," and in fact, he says in this way, "I don't own anything in the world." He told me that a couple of times and that he had given the bonds of the railroad to Charles H. Smith, and had disposed of his property by deed to some of his daughters, and had given something to another son, I think. As near as I can recollect is, "that he had turned the bonds over; that he had given them to him; that they were turned over to Charles H. Smith." I don't know how long the conversation lasted, but I was up there maybe a half an hour. He talked a good deal more, but he was a man of very few words. If you ask him a question his mouth would close like a clam. He would not talk anything in the way of a suggestion from you. I think I had a third conversation in his room (with J. W. Smith), only several days before his death. C. H. Smith and J. W. Smith were there then. During the second conversation Charles H. Smith was not in the room. I remember the date of the deposit of the $2,500 by referring to the books of the bank. Charles and his father had talked with me about the account in the name of C. H. or J. W. Smith. I delivered the tin box to Charles a short time before his father's death. The exact date I cannot say. During the first conversation J. W. Smith was in his bed or lying on the bed. During the second conversation he was lying on the bed. That was his last illness. I think he was bolstered up in bed the last visit I made to him. I know I have been in there a number of times when Mr. King would bolster him up in bed and he would write

that way sitting up in bed. I saw him a number of times when he was writing sitting up in bed. In the presence of C. H. Smith he said, "I don't own a dollar in the world." He told me he had disposed of his property by deed to his daughters, and I think something to his son, and that he had turned over his bonds to Charles. He said, "I have given and turned over my bonds to C. H. Smith." I am not attempting to state the exact language. I was there the day before J. W. Smith died. Charles was there also. I think J. W. Smith knew me the last time I was there, but he didn't have much to say. I think he called me by name, but I would not be sure. Sometimes I would say to him when I would go in, "Well, Captain, how is the boy this morning," and he perhaps would say he didn't know, and perhaps would smile, and perhaps call me by name, but this time I could not just exactly tell. I gathered that he recognized me from the expression of his face, but I could see the last time I saw him that he wasn't going to live long. I think the day or two before he died he closed his eyes a good deal. He always opened his eyes when I went around to him, but you could see he was a man nearing death. He was a very strong man and some of the best things I ever heard a man get off were said by him, and he was a great deal smarter than the boy you are having your lawsuit with. I have had business transactions with C. H. Smith since his father's death. I hold some of the receiver's certificates of the California and Nevada Railroad Company. I think Charlie told me that if the bank took the certificates he would see that we got our money.

I do not remember just what he or Mr. King did say, but my impression was that it was all right, that we would get our money sometime. I think we have $1,200 or $1,400 worth of the receiver's certificates.

Redirect Examination.

I was well acquainted with the signature of J. W. Smith in his lifetime, and saw him write his name frequently. I recognize the signature on this paper you hand me as J. W. Smith's signature and the writing of the paper is Charles H. Smith's writing.

The assignment was thereupon produced and offered and admitted in evidence, and marked Plaintiff's Exhibit "G," and said paper reads as follows:

Plaintiff's Exhibit "G."

"Oakland, Cala., August 14th, 1895.

"For value received, I hereby sell, deliver, and assign to C. H. Smith all the bonds which I own of the California & Nevada Railroad Co., being 304 in number, of $1,000 each, including the order and requisition on the Central Trust Co. for 75 of the said bonds, subject to the option given to F. M. Smith, which I also assign to C. H. Smith.

"J. W. SMITH."

Recross-Examination.

Mr. CANNON.—Q. Did you ever see this document just read in evidence before to-day?

A. No, sir, I never did.

Q. Was it ever in your possession, the possession of the bank? A. Not to my knowledge.

Q. Did you ever hear of its existence before to-day?

A. I never talked with anybody about it before to-day.

W. R. THOMAS, called as a witness for the plaintiff in rebuttal, and being duly sworn deposes and says: I reside in Oakland, California. I have resided there thirty years. I knew J. W. Smith for twelve years before his death. I saw him off and on up to the time of his death. I think I last saw him the day before he died. I had business transaction with him covering a period from 1888 or 1889 up to the time of his death. We were engaged in mining business together for several years. I had considerable correspondence with him and did considerable writing for him. As far as his handwriting and signature is concerned I am well acquainted with it. I had a great deal of correspondence with him. I visited him after he was taken sick and confined to his room. I may say I was there every other day at least. Sometimes every day during his sickness. He made a statement to me about the disposition of his property—that he had deeded away all his property and disposed of his property, so that in the event of his dying there would be no trouble about his estate to avoid litigation. I was present at the time he acknowledged deeds to quite a number of pieces of property. As notary public I took his acknowlments. From my observation of Mr. Smith, at the time I saw him after he became sick and was confined to his room, he was, in my opinion, sane. My reasons for saying that he was sane are from the fact that I never knew him to do anything that I considered was insane, to do or say anything that I considered was evidence of insan-

ity. I talked with him on my visits to him. I would remain not less than one-half an hour, I think, at any one time. I have seen him write, and had occasion often to see his signature.

Q. I hand you a paper now marked Plaintiff's Exhibit, "G," and ask if you will examine the signature to that paper (handing). State whether or not in your opinion that is the signature of John W. Smith, deceased.

A. That is his signature. I have a memoranda by which I can fix the date upon which I took the acknowledgments to the deeds. After refreshing my memory from the memoranda I can state upon what date I took those acknowledgments. It was August 14, 1895. At that time J. W. Smith stated that he had made deeds of his property to his children and desired to acknowledge them. He said at that time he was deeding his property to his children and wanted to acknowledge the deeds and for me to put on my seal. He said nothing further at that time in relation to those deeds. He had said something about it prior to that time. He said prior to that time that he was going to deed all of his property before his death, and he said, "I may want you to make out a lot of deeds for me. I am going to deed all of my property away before my death, so as to avoid any litigation hereafter." He said, "I am going to do that rather than make a will, because there is always a chance for litigation on a will." He seemed to be afraid there would be if he made a will, and he proposed to distribute it all before his death.

Cross-Examination.

I did not make out the deeds in question. They were executed in Captain Smith's room, at 408 13th street, Oakland, at Mrs. Stewart's house. The date was August 14, 1895. I could not have remembered the date without looking at this record. It is from the record that I am testifying as far as the date is concerned.

Q. Turn to that record again. I call your attention to the fact that the record you have produced of the entries containing the memoranda of deeds, the Smith deeds, is of a different colored ink from your other memoranda.

A. Yes, sir. I made that record in Captain Smith's room at his desk. I used that same ink during the execution of all those deeds. The ink was on his desk. I took my record-book and seal book with me, and used that ink in drawing the acknowledgments. I think Captain Smith used that ink in signing the deeds. I am not certain whether he used the same ink or not. I think he did. I did not notice particularly if there was any other ink there at that time. It seemed to me a common bottle of ink that I used in all the business transactions at that time. It was at his desk, and the business was done at his desk in that room.

Mr. CANNON.—I offer the memoranda for the purpose of showing the Court. I want the Court to see it particularly with reference to the color of the ink. It was thereupon admitted in evidence and is as follows:

"Oakland, Cala., August 14th, 1895.

"For value received I hereby sell deliver and assign to C. H. Smith all the bonds which I own of the California and Nevada Railroad Company, being three hundred and four in number of $1,000 each; including order and requisition of the Central Trust Company for 75 of the said bonds, subject to option given to F. M. Smith, which I also assign to C. H. Smith.

"J. W. SMITH."

The witness continuing testified: During the last few months of Mr. Smith's lifetime I saw him nearly every day from the time he was taken down, confined to his room until his death, that is, once every other day, anyway. At the time he was first confined to his room he was not quite weak. I could not say he became bodily weak a short time afterwards. Sometimes his complaint seemed to be with a severe pain across his back. He was not able to get up and down stairs. He remained in his room. Bodily, he seemed to be pretty well, except this pain. He complained of kidney disease. He complained of a pain across his kidneys, in his back. Sometimes while I was there he would pretend to make an examination of his urine and hold it up to the light. I have seen him do that. I have never seen him take any of his urine in a bottle and let it stand for a couple of days to see the sediment that had settled in it. I had it done myself on my own account. I got the results from the physician who made the test. I think that was in August of the year of his death. At that time Mr. Smith was confined to his bed as a rule—confined to his room. Dur-

ing nearly all of his sickness he was confined to his room. He would lean on the back of a chair and push the chair in front of him when he went over to his desk, or went overto a sofa there was there, where he would rest part of the time. That was the case along during August. Then he gradually got weaker after that as the disease progressed. I think I saw him last the day before his death, and also probably a day or two before that. My recollection is that I was there about every other day. I could not state exactly when I was there prior to the last visit. I should say the second day before that. I could not swear I was there the second or third day. I will not swear it was not three days before that. I could swear it was not to exceed three days before his death and the day before. I did not see Charles H. Smith there the last time I was there. I did not remain more than two or three minutes. I did not attempt to have any conversation with him at that time. He was then in his bed lying down flat. His eyes were closed. I attempted to have no conversation with him at all. I thought he was asleep. At the conversation three days or so prior to that I presume I did have some conversation. I would usually go in and go to the bed. I spoke to him; I remained not to exceed three or four minutes. I spoke to him and took hold of his hand. I was there about two days before that time. In the conversation I testified to having with Mr. Smith as to deeding away his property he said, "I have deeded away my property to my children to avoid litigation and paying lawyers." I think he used those words. That was on the 14th day of August,

when I took the acknowledgments. The other conversation referred to, which occurred prior to that time was, he said he was going to deed away his property to his children. Those are the only two conversations I had with him upon that subject.

Q. You say, Mr. Thomas, that you recognize the signature to that document Plaintiff's Exhibit "G," as being the genuine signature of J. W. Smith?

A. Yes, I call this his signature.

Q. Do you remember any one peculiarity of J. W. Smith's signature now?

A. I simply say that I know his signature as well as I know my own.

Q. Can you state one peculiarity of J. W. Smith's signature?

A. I do not know what you would call a peculiarity. He had a fine signature. He wrote a good signature. He wrote a very plain hand. I know just about how many motions he made to make the signature. I think at the latter part of his signature there was always a sort of flourish you might call it, a scroll line sometimes extending clear around the signature. That was the rule. I do not know, I am sure, whether it was always the invariable rule or not. It was a rule. I suppose it was a characteristic of his signature. I could not say it was invariably the rule. There is that about his signature that I do not think I could be mistaken.

Q. I call your attention to the signature "J. W. Smith," on "Defendant King's Exhibit No. 3," and ask if you find that characteristic of the scroll on that signature (handing). A. That is his signature.

Q. Is that what you mean by the peculiar scroll at the ending of his signature?

A. Not so much as that. I know that he would always bring his pen around. I do not know exactly the motion he made. I do not think I have seen a signature that had as much of a scroll to it as that had.

Q. You claim to be quite familiar with his signature?

A. Yes, sir. I am quite familiar with his signature.

Q. Look at the signature on "Defendant King's Exhibit No. 4." Did you ever see as much of a scroll as there is on that document (handing)?

A. I do not remember that part of the scroll going over here, from here over (pointing). Still that is Smith's signature.

Q. I turn over to the next page of the same exhibit, and ask if you have ever seen that much of a scroll on his signature?

A. I don't remember ever seeing as much of a scroll over here as there appears to be upon that signature. The lower portion of the scroll I remember that he always brought down the lower portion.

Q. You do not remember on any of these signatures I have shown you, the line above the name?

A. I don't remember of that being a characteristic of his signature. I do recognize the lower part here as being a customary scroll on his signature.

Q. You cannot say whether or not that was a characteristic of his signature?

A. I can swear those are his signatures on these papers.

Q. Have you any signatures of J. W. Smith in your possession written on or about the 14th of August, 1895.

A. No, sir.

Q. Have you any of those deeds in your posssesion mentioned in evidence here? A. No, sir.

Q. Have you had any of those deeds in your possession since August 14, 1895? A. No, sir.

Q. Would you call the straight line after the "h" in Plaintiff's Exhibit "G" and the straight sweep crossing the "t" characteristics of J. W. Smith's signature?

A. No, sir.

Q. You would not? A. No, sir. I would not.

Q. Did you ever see a signature of J. W. Smith's with those lines on that I have just mentioned?

A. I cannot say whether I have or not.

Q. What is you best judgment about it?

A. My best judgment is that his signature was usually made with a scroll at the bottom.

Q. What single thing is there in the signature before you now in Plaintiff's Exhibit "G" which you consider a characteristic of J. W. Smith's handwriting?

A. All of the letters in the name "J. W." and "Smith," and the way they are run together.

Q. How? Explain a little more in detail.

A. The general appearance satisfied me that it is his handwriting.

Q. Is not the scroll a part of the general appearance?

A. The scroll is not here.

Q. The scroll that you have already described as ac-

companying the signature, is not that a part of the general appearance?

A. A part of the general appearance of the scroll. The general appearance of those letters are Smith's.

Q. Is not the straight line after the "h" and the cross on the "t" a part of the general appearance of that signature?

A. There could not be a scroll of that nature put on this signature if this was all the paper he had had to write upon at that time.

Q. You are willing to go on record as saying that Mr. Smith could not put a scroll on there, if he had desired are you?

A. There is not room for it. It is a mechanical impossibility.

Q. I am asking you, are you willing to go on record as saying that Mr. Smith could not put a scroll on there if he had desired?

A. I will go on record as saying that Mr. Smith could not have put the usual scroll that appears on his usual signature on this piece of paper now in my hand, unless the paper at the time the writing was made was larger than it is now.

Q. Why do you make the last qualification as to the possibility of the paper being larger than it is now?

A. Because there is no room on the paper below the word "Smith," for the scroll as it usually appears on his signature.

Q. I ask you to place side by side the signatures at the end of the escrow agreement "Defendant King's Exhibit

No. 4" with this and state to the Court in which particular you claim the letters of those two signatures bear the same general characteristics.

A. He commenced the "J" at the upper part of the latter "J" with a downward stroke, and then comes around and connects the "W" with the "S." In other words, he writes the whole thing "J. W. S." without taking his pen off. What I meant by there not being a chance for a scroll was, if he had come around with his usual scroll he would have run off this card if there was no more room on the card. Anyone writing like that would have run off sure.

Q. You have testified to that; go on.

A. That is all there is to it.

Q. I call you attention to the first statement in which you say he commences the "J" with a downward stroke, if in the signature I have just shown you, an admittedly genuine signature, he did not commence his "J" with an up stroke. A. No, sir.

Q. Do you not see this up stroke (pointing)?

A. Oh, yes, I see that.

Q. Do you find that in the signature in Plaintiff's Exhibit "G"?

A. Well, the general appearance of the letter is the same.

Q. Answer the question.

A. No, sir, I do not find the same little curl there.

Q. In the first downward stroke of the "J" and the second downward stroke of the "J," do you find the parting of the nibs or the heavy appearance of the signature.

the shading, do you find that as it appears in Exhibit "G," an admittedly genuine signature.

A. The letters are not shaded as heavily on this thin paper as they are on the heavy paper.

Q. I call your attention to the loop of the capital "S." Do you find as large a loop in the disputed signature as in the genuine signature?

A. I little difference in the size of the loop.

Q. Does not the whole signature in the disputed signature have a stronger, firmer look than the genuine signature I have just shown you, as though it were made with a stronger and more powerful hand?

A. It looks, as though it were made with a more bold hand, that is, bolder writing.

Q. Did you see him sign the deeds on the 14th day of August, 1895? A. Yes, sir.

Q. He signed these in your presence with the same ink that you used in making the memoranda?

A. I do not know if he used the same ink. He signed the deeds though.

J. J. SCRIVNER a witness called for the plaintiff in rebuttal, and being duly sworn, testified as follows:

Mr. BOLTON.—Q. I hand you a paper dated Oakland, Cal., May 27, 1900, addressed to J. J. Scrivner, Esq. Is that your signature to that paper (handing)?

A. Yes sir. I really cannot call to mind receiving that paper from Mr. Smith. I must have done so. Let me think there a moment. There have been so many papers, that I do not just now recall it to my mind.

That is September 22, 1890. There is no doubt but what that is my signature, and I wrote that cancellation. I think the signature attached to this document is the signature of J. W. Smith. I have no doubt about it whatever, although it is not his usual signature. I have no doubt it is his signature. My best recollection is that I have had that document in my possession, and acted upon it as a genuine document and upon the signature to it, as the genuine signature of J. W. Smith.

Said document was thereupon offered and admitted in evidence and marked Plaintiff's Exhibit "H," and is in substance as follows:

Plaintiff's Exhibit "H."

"Oakland, Cal., May 27th, 1890.

"J. J. Scrivner, Esq.

"Dear Sir: At your request I hereby authorize you to sell all my interest in the California & Nevada Railroad, including bonds, stock, material on hand at date of purchase, one locomotive engine, and a piece of land in Oakland fifty by four hundred and thirty feet, adjoining the Southern Pacific Railroad Company etc.

* * * * * * * *

"In witness whereof I have hereunto set my hand this 27th day of May, 1890.

"J. W. SMITH.

"I have no duplicate copy of above. May 27, '90.

"J. J. SCRIVNER.

"Canceled this June 23d, 1890. J. J. Scrivner."

Mr. BOLTON.—Q. Look at that letter, please (handing). I do not call your attention to it for the purpose of its contents, but for the purpose of looking at it, to see if that is in the handwriting of J. W. Smith.

A. I think it is. Although it is not his usual business signature, I have no doubt but that it was written by him and it is his signature.

Said document was thereupon offered and admitted in evidence and marked Plaintiff's Exhibit "I," and is in substance as follows:

Plaintiff's Exhibit "I."

"Letter dated Oakland, Cal., May 1, 1895, addressed to C. H. Smith (Dear Son), and signed, Your afft. father, J. W. Smith."

Q. I now call your attention to an envelope of September 11, 1885, at the top of it, and ask you if the handwriting upon that envelope and the signature is in your opinion the handwriting of J. W. Smith (handing).

A. I should say it was.

Said document was thereupon admitted in evidence, marked Plaintiff's Exhibit "J," and is in substance as follows:

Plaintiff's Exhibit "J."

"Envelope. Memo. thereon. Dated Sept. 11, '85. Signed J. W. Smith."

Mr. BOLTON.—Q. I hand you a paper marked February 1, 1893, memorandum on the bottom and the signature. State to the Court whether that is the handwriting of J. W. Smith. A. I should say it was.

Said document was thereupon offered and admitted in evidence and marked Plaintiff's Exhibit "K," and is in substance as follows:

Plaintiff's Exhibit "K."

"Letter dated San Francisco Jan. 30, 1893, addressed to Mr. J. W. Smith, Oakland, Cal., and signed by California & Nevada R. R. Co., by E. A. Phelps, Treas. Underneath is a memorandum dated Feb. 1, '93, and signed by J. W. Smith."

Cross-Examination.

Mr. CANNON.—Q. You said something in your testimony about a former business signature of Mr. Smith and a signature of a letter or an ordinary paper. Do you mean to make such a distinction?

A. I do. For many years prior to his death, and since a circumstance that we are all familiar with, connected with this matter, but the date even of the year I cannot locate, when Mr. Smith's signature was forged to a check in the bank here, I believe it must have been about 1883 or 1886, here, and as he explained to me personally, adopted a scroll around it, and afterwards around his name, similar to some of those exhibits.

Q. In the exhibits shown to Mr. Thomas?

A. Yes, sir, and for the purpose, as he said, as I understand and remember it—it was a long time ago—for the purpose of preventing his signature being forged. I do not want to be entirely and absolutely certain about these things; it is too long ago, but in my early acquaintance with Mr. Smith, I think he wrote his straight signa-

ture without any lines of any kind, but latterly, for a number of years to his death, it was his custom, beyond doubt, I think, to accompany his signature with some extra marks of that character. He would use this formal signature with the scroll on his business paper—contracts and the like.

Q. Do you know to what extent he adopted that custom with his letters?

Q. I show you what purports to be a check dated Oakland, Cal., April 2, 1895, on the Central Bank of Oakland, and ask you to examine the signature upon that and state in whose handwriting it is (handing).

A. J. Smith's signature. The scroll I mentioned is there. The scroll was not always uniform, but it appeared in some shape there.

Said document was thereupon offered and admitted in evidence and marked "Defendant's Exhibit No. 6," and is in substance as follows:

Defendants' Exhibit No. 6.

"Check, dated Oakland, Cal., Apl. 2, 1895, on Central Bank of Oakland, in favor of J. J. McSorley for fifty dollars. Signed by J. W. Smith."

Q. I show you now a check dated San Francisco, April 6, 1895, on the London, Paris & American Bank, and ask you whose signature is attached to it (handing).

A. The same. That contains the scroll.

Said document was thereupon offered and admitted in evidence and marked "Defendants' Exhibit 7," and is in substance as follows:

Defendants' Exhibit No. 7.

"Check, dated San Francisco, April 6, 1895, on London, Paris & American Bank, in favor of Miller, Sloss & Scott, for $99.40. Signed by J. W. Smith."

Q. I show you a check dated April 8, 1895, on the London, Paris & American Bank and ask you whose signature is attached to it (handing).

A. J. W. Smith's. It contains the scroll.

Said document was offered and admitted in evidence and marked "Defendants' Exhibit No. 8," and is in substance as follows:

Defendants' Exhibit No. 8.

"Check, dated, San Francisco, April 8th, 1895, on London, Paris & American Bank in favor of Central Bank of Oakland for one thousand dollars. Signed J. W. Smith."

Q. I show you a check dated San Francisco, May 8, 1895, on the London, Paris & American Bank and ask you whose signature is attached to that (handing).

A. J. W. Smith's. It contains the scroll.

Said document was offered and admitted in evidence, marked "Defendants' Exhibit No. 9," and is in substance as follows:

Defendants' Exhibit No. 9.

"Check, dated, San Francisco, May 18, 1895, on London, Paris & American Bank in favor of George W. Norton, for $15.00. Signed by J. W. Smith."

Q. I show you a check dated San Francisco, May 28, 1895, on the London, Paris & American Bank, and ask you whose signature is attached to that (handing).

A. J. W. Smith's. It contains the scroll.

Said document was offered and admitted in evidence, marked "Defendants' Exhibit No. 10." and is in substance as follows:

Defendants' Exhibit No. 10.

"Check dated May 28, 1895, San Francisco, Cal., on the London, Paris & American Bank, in favor of First National Bank of Oakland for one hundred dollars. Signed by J. W. Smith."

Q. I show you a check dated, San Francisco, Cal., July 30, 1895, on the London, Paris & American Bank, and ask you whose signature is attached to it (handing).

A. I should say that it was Captain Smith's signature.

Said document was offered and admitted in evidence, marked "Defendants' Exhibit No. 11," and is in substance as follows:

Defendants' Exhibit No. 11.

"Check, dated, San Francisco, Cal., July 30, 1895, on the London, Paris & American Bank payable to order of himself, 1st National Bank, for one hundred dollars. Signed by J. W. Smith."

Q. I show you a check, dated Oakland, Cal., August 6, 1895, on the Central Bank, and ask you if that is J. W. Smith's signature attached to it (handing).

A. Yes, sir.

Said document was thereupon offered and admitted in evidence, marked "Defendants' Exhibit No. 12," and is in substance as follows:

Defendants' Exhibit No. 12.

"Check, dated Oakland, Cal., August 6, 1895, on the Central Bank, in favor of J. F. Daniels, Supt., for $16.00. Signed by J. W. Smith."

Q. This is the next day after the proposed assignment. I show you a check on the Central Bank, dated August 15, 1895, and ask you if that is his signature (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked "Defendants' Exhibit No. 13," and is as follows:

Defendants' Exhibit No. 13.

"Check, dated Oakland, Cal., August 15, 1895, on the Central Bank of Oakland for $200. Signed by J. W. Smith."

Q. I show you a check dated Oakland, Cal., August 15, 1895, on the Central Bank, and ask you if that is J. W. Smith's signature (handing). A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 14, and is in substance as follows:

Defendants' Exhibit No. 14.

"Check, dated, Oakland, Cal., August 19, 1895, on the Central Bank in favor of J. J. McSorley for $69.31. Signed by J. W. Smith."

Q. I show you a check dated Oakland, Cal., September 2, 1895, on the First National Bank, and ask you if that is J. W. Smith's signature (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 15, and is in substance as follows:

Defendants' Exhibit No. 15.

"Check, dated Oakland, Cal., September 2, 1895, on the First National Bank in favor of Mrs. Mary Stewart, for $28.75."

Q. I show you a check dated Oakland, California, September 9, 1895, on the First National Bank, and ask you if that is J. W. Smith's signature (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 16, and is in substance as follows:

Defendants' Exhibit No. 16.

"Check, dated Oakland, Cal., September 9, 1895, on the First National Bank, in favor of W. R. Thomas, for one hundred dollars. Signed by J. W. Smith."

Q. I show you a check dated Oakland, California, October 2, 1895, on the First National Bank, and ask you if that is J. W. Smith's signature (handing).

A. Yes, sir.

Said document was thereupon offered and admitted in evidence, marked Defendants' Exhibit No. 17, and is in substance as follows:

Defendants' Exhibit No. 17.

"Check, dated Oakland, Cal., October 2, 1895, on the First National Bank, in favor of J. W. Thomas. Signed by J. W. Smith."

Q. I show you a letter dated Oakland, California, March 7, 1893, purporting to be written to Mr. E. A. Phelps, and ask you if that is J. W. Smith's signature to that letter (handing). A. Yes, sir.

Said document was thereupon offered and admitted in evidence, marked Defendants' Exhibit No. 18, and is in substance as follows:

Defendants' Exhibit No. 18.

"Letter, dated Oakland, California, March 7, 1893, addressed to Mr. E. A. Phelps, Secretary & Treasurer California Railroad Company, and signed J. W. Smith."

Q. I show you what purports to be a certificate of stock in the Wilderness Gold Mining Company, dated October 3, 1891, and ask you if that is the signature of J. W. Smith as president (handing). A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 19, and is in substance as follows:

Defendants' Exhibit No. 19.

"Certificate of stock No. 220, dated Oct. 3, 1891, for 100 shares of The Wilderness Gold Mining Company. Signed J. W. Smith, resident, countersigned C. K. King, Secretary."

Q. I show you another certificate, certificate No. 217 of the same company, and ask you if that is his signature to that one—dated October 23, 1891 (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 20, and is in substance as follows:

Defendants' Exhibit No. 20.

"Certificate of Stock No. 217, dated October 3, 1891, for 100 shares of The Wilderness Gold Mining Company. Favor of J. W. Smith."

WILLIAM R. DAVIS, a witness called for the plaintiff in rebuttal, and being duly sworn, testified as follows:

I reside in Oakland, California. My occupation is attorney at law.

Q. I call your attention to Plaintiff's Exhibit "G," and ask you if you ever saw that paper before.

A. (After examining Exhibit "G.") I have seen it before. I cannot fix the date as a matter of dates, but my best recollection is that I saw it first in 1898 or the early part of 1899. There was a citation pending in the Superior Court of Alameda County, a citation of C. K. King, as administrator of the estate of J. W. Smith, deceased. At that time Charles H. Smith came out to California, and amongst other things involved in that citation on a complaint of some of the heirs—don't remember their names now—was the question of whether Mr. King had inventoried in the estate and accounted for all the property of the estate which he ought to. That was the basis of the citation; it was claimed that he had not. It also included an attack in some way concerning the deeds and conveyances. At that time Charles H. Smith came out here from Denver, and was at my office in connection with the hearing or trial of that case, which lasted some four or five days, and my recollection is that at that time he had this paper. It was not produced in court; I re-

member that distinctly, that it was not. I was at that time representing the administrator, in conjunction, as I remember it, with Mr. F. W. Sawyer, who was his regular attorney. That hearing never went any further than the examination made by the attorneys for the heirs. At the conclusion of the examination of the witnesses by them, Judge Ogden dismissed the citation. In the taking of that testimony this paper did not appear in evidence. But it was on that visit here, I am satisfied, that Mr. Charles H. Smith showed me this paper. I was not acting as his attorney then. I was representing Mr. King. He was at that time cited by some of the heirs whose names I do not now recall. I think Mrs. Snodgrass was one of them. It was an odd name, and I think Mrs. Snodgrass was one of the citing heirs. This was part of the evidence I was considering then in behalf of the administrator to discharge the citation. As I say, it never came to that, because when the hearing on the citation had proceeded to the point where the heirs had examined witnesses and rested, the citation was discharged without Mr. King's introducing, as a matter of defense, any testimony. I next saw that instrument at some time in the year 1900. Approximately six or seven months ago to ten months ago. That was in Oakland at my office. Mr. Charles H. Smith had it then.

Cross-Examination.

I could not fix the date in 1898 when I first saw that document, but my recollection is, it was the latter part of 1898 or early in 1899, when that hearing came up of which I spoke, was the time. I was representing Mr.

King, the administrator at that time in part. I think his regular attorney, Mr. Sawyer, was there also. I was working in conjunction with Mr. Sawyer in the matter of that citation. The heirs were complaining in the complaint on which the citation was issued, that Mr. King should have inventoried the bonds and some other property, and they were also assailing his accounts, I remember, at that time. There was a long list of items in his accounts that they objected to and the citation was in regard to that matter. I cannot remember whether or not I told Mr. King that I had seen such a paper as that.

Q. At any time between the time you saw it in 1898 and the time you saw it in 1900, did you say to Mr. King that you had seen any written evidence of any character of an assignment of these bonds?

A. I can't remember. My impression is that it was talked about more than once between Mr. King and myself.

Q. What was talked about?

A. About the fact that Mr. Charles H. Smith having this assignment or paper.

Q. Will you swear that it was?

A. Oh, I can't swear positively, because there were so many conversations between clients and attorneys, and between different attorneys in the same case. I cannot remember any particular time or place in which that occurred. But Mr. King has talked to me in the presence of Charles H. Smith so many times about it, in which conversations the ownership of the bonds by Mr. Charles H. Smith was discussed, so I cannot say whether this particular paper was talked about, or anything about it.

I am satisfied that I have stated to him that this paper was in existence, but I don't think, at least, I don't recall, whether Mr. King was present when Mr. Charles H. Smith showed me this paper. They would frequently be in the office together, and frequently not.

Q. You are satisfied you did?

A. I am satisfied, yes, sir.

Q. Do you mean that your recollection is that you did?

A. Yes, sir. There is nothing in that recollection as to time, place, circumstances, or persons present, when I told Mr. King. I could not locate that, because there were so many conversations between Mr. King and myself during that trial and before and after it. I suppose I would be safe in saying there were a hundred.

Q. You simply have an impression that you did tell Mr. King about that?

A. No, sir, it amounts to more than an impression. I cannot fix the date in 1900 when I saw it, but it was at a time when Mr. King filed a report in the Superior Court of Alameda County for final distribution and settlement of his accounts—distribution of the estate—to which subsequently objections were filed. It was that matter, that transaction. On that occasion Mr. Charles H. Smith showed me that document. I cannot remember whether I told Mr. King that I had seen it then.

Q. You know that there has been considerable litigation in this regard in connection with the California and Nevada Railroad, and the foreclosure of the mortgage thereon, and the bonds of the railroad company, do you not?

A. I heard of it. I had talks with Mr. Judkins about that matter in a general way about the time of which I have spoken, that is, when the hearing came up in the Superior Court of Alameda County in 1900. That is the first time I ever knew Mr. Judkins. I cannot remember the date when that was. But it was anywhere from six months to a year ago. I do not think I ever talked with Mr. Judkins on the subject of these bonds since those matters were all in court there. I do not remember that I ever stated to Mr. Judkins that I had seen any such document as that. My impression is not. I was representing the administrator in the Superior Court of Alameda County when the question of the ownership of these bonds came up and Judge Greene appointed appraisers to appraise the bonds. And at the time he appointed Mr. Judkins as attorney for absent heirs. I heard discussions as to the ownership of these bonds in Judge Greene's court, more particularly at the time that Mr. Judkins appeared in these later proceedings in 1900. There were some lively proceedings in Judge Greene's court within the last year over the ownership of these bonds. The vital point in issue in all of these proceedings was whether the estate of J. W. Smith owned these bonds, or whether Charles H. Smith owned them personally. That was intimated. It did not come to issue before the Court. It was discussed, as I have said, with considerable vivacity and perhaps vehemence, I would not say with acrimony, but that was from the bar to the bench and from the bench back to the bar. There were not any trial proceedings.

Q. Did you ever, at any of these times, rise as a member of the bar of Alameda County, or a friend of the Court, or as attorney of the administrator, and say that this whole proposition could be settled in a very few moments; that you had seen a written assignment of these bonds to Charles H. Smith? A. I did not.

Q. Did you ever make any suggestion of that kind to the Court? A. No, sir, I did not.

Q. Did you ever intimate to the Court or to any of the counsel there present that you had seen a written assignment of these bonds?

A. I don't remember whether I did or not. As it came up, this lively performance that you refer to, it was so active that there was not any opportunity to state or to take any evidence about it. I remember Mr. Bolton trying to get a little further along with the proceeding, when he was cut off.

Q. Then the reason why you did not mention it was because there was so much talk there that you did not have a chance to chip in, is it?

A. No, sir, that is not the fact. The fact is that the Court appointed Mr. Judkins to represent the heirs, and said he didn't want to hear anything more about it on that proceeding, and that the administrator, Mr. King, to proceed to inventory them and get possession of them by whatever proceedings were necessary, if he could. So that matter ended rather summarily. I withdrew from the attorneyship of Mr. King, but that hadn't anything to do with it. I was not a part, Mr. Cannon, of the lively proceedings. I was simply a spectator, and it was be-

tween Mr. Bolton, representing some heirs, and Mr. Judkins, representing some heirs and the Court. I was simply sitting there in a neutral position as to the contest between the heirs and the Court, and Mr. Judkins representing other heirs. Mr. Bolton, the attorney for plaintiff, was in court during some of those proceedings.

Q. Did he ever make the statement in Court that there was any written evidence of the ownership of those bonds? A. I don't remember.

Redirect Examination.

Q. Mr. Davis, do you remember a conversation at that time in Judge Greene's court, which took place between counsel for Mr. C. H. Smith and Mr. Judkins, in which counsel for Charles H. Smith stated that there was an instrument in writing covering these bonds or words to that effect?

A. I have no clear recollection about that. There is an impression in my mind that that occurred, and that it was in confused talking—in the confusion between the bench and the bar. And yet I would not say positively that it did or did not occur. I know there were times there when I, as a listener, was not able to follow all that was said. At the time that that controversy in Judge Greene's court had got down to the ownership of these bonds, the account then pending had not quite been settled. I suggested to the Court that it be turned into an intermediate or annual account, and be settled in that way, and it was taken up and gone at and disposed of as an intermediate account. Mr. King at that time, and

before the account was finally settled, wanted me to go on with this litigation with regard to these bonds here, whether they should be inventoried here or not. There were two reasons why I did not go on. The first was that I had done a good deal of work and compensation was very meager, and I did not see any assets in the estate, and I told him I would not take it on a contingency, there was too much work in it. Another reason was that, during previous trials in the matter I first spoke of, on the citations and in many private conversations and conferences, Mr. King had stated, and the record of his testimony in that case shows, that the bonds did not belong to the estate of J. W. Smith, and I did not care to represent a client who had stated that in a courtroom in my hearing and then take the opposite position. Those were the two reasons why I did not stay any further as attorney in the case, in this matter.

J. W. HAVENS, called as a witness for the plaintiff in rebuttal and being duly sworn, testified as follows:

I reside at Gridley, California. My business is banking and real estate business. I have been engaged in the banking business fifteen years. I was connected with the Central Bank in Oakland about eight years. I was paying teller and assistant cashier. I went into the employ of the bank about 1892, and retired a year ago January. I knew J. W. Smith in his lifetime, and have had occasion to examine his signature. He was a customer or depositor of the bank.

Q. I show you a paper marked Plaintiff's Exhibit "G," and ask you if you will examine the signature to that

instrument and state to the Court whether in your opinion that is the signature of J. W. Smith?

A. (After examination.) I think it is.

Q. Will you state to the Court any difference between that signature, or the method of writing it, and the signature upon the checks which came into the bank, so far as you have observed them?

A. On his check he used to make a great many flourishes. He had transactions with the bank up to the time of his death, which occurred about five or six years ago. I have had occasion to see his signature and see him write. I have seen him write his signature. He came to the bank frequently. I have never seen him writing except writing his signature. He has gone to the counter and drawn checks, and I have paid them. From that observation of his signature and his handwriting I think the signature of Plaintiff's Exhibit "G" was written by J. W. Smith.

Cross-Examination.

I first saw the signature of J. W. Smith when he opened his account with the bank. I could not tell you the year when he first came there. I think it was a year or so before he died. It may have been longer. I learned his signature by paying his checks. I paid all the checks that were paid on his account. I think I have seen his signature on notes and documents at the bank. I could not say as to whether there was the same character of signature on those documents as on the checks with the flourish that I spoke of.

Q. Do you remember of ever seeing a signature of J.

W. Smith's with the straight line crossing the "t" and a line straight off at the end of the "h".

A. I could not say.

Q. During the time that you were cashing checks signed by Mr. J. W. Smith, do you know of his getting weaker and finally becoming sick?

A. No, sir, I do not. I remember that he did not come to the bank and that he was home, and they said he was sick. I remember paying checks for two or three months prior to his death. I do not recall any change in his signature from the time he first began to do business at the bank until shortly before his death.

Q. I show you a check being defendants Exhibit No. 13 of date August 15, 1895, and ask you to compare it with the signature of Plaintiff's Exhibit "G." Place them side by side and look at them? A. Yes, sir.

Q. Do you notice any difference in the characteristics of those two signatures?

A. Yes, sir. One seems to be a little more shaky than the other.

Q. In your judgment, then, as having knowledge of Mr. Smith's handwriting, you would say that that signature to the bank check appears more shaky than the signature to Plaintiff's Exhibit "G"?

A. A little more shaky in this, yes, sir. The signature to Plaintiff's Exhibit "G" appears more strong and firm and vigorous looking, it is heavier. The lines are smoother. There is less tremor.

Q. Having the appearance as though made by a stronger hand?

A. No, sir, it might be; you know, that a man when he stands up and when he sits down writes differently. He may be in a position that his hand trembles.

Q. Do you see any more difference between these two signatures than the difference that ordinarily occurs in the signature of a man in his position, sitting and standing?

A. I think the general characteristics are the same.

Q. That is not what I asked you?

A. What was that question again?

Q. I am asking you if you do not see more difference, particularly with the tremulousness and the weak character of the signature—more difference between those two than ordinarily occurs between the two signatures of a man where he stands and sits? Is there not a greater disparity between those two?

A. It depends upon the man.

Q. I will show you a check of August 19 and one of August 6th, and ask you if those signatures do not bear the same tremulous characteristics as the check of August 15th? A. Yes, sir.

Q. Do you find any of that tremulousness in the signature to Plaintiff's Exhibit "G"? A. No, sir.

Q. Examine it very carefully?

A. This (Exhibit "G") is plainer.

Q. I show you checks running from April 2d up to October 2, 1895, and ask you if you do not find the same tremulous characteristics in those signatures, and in the ones immediately before and after the date of the instrument in question?

A. (After examining checks.) Some of these are tremulous and some are not.

Q. Pick out one, Mr. Havens which you say is not more tremulous than Plaintiff's Exhibit "G."

A. (After examining further.) There is one dated April 6, 1895. (Defendant's Exhibit No. 7.) That does not show it.

Q. You say the check Defendant's Exhibit No. 7 of April 6, 1895, does not show any more tremulousness than the signature in question? A. No, sir.

Q. You say it does not. A. No, sir.

Q. I ask you to look at them both through this glass, and see if you still make the same answer?

A. (After examining through the glass.) There may be a little slight bit more on the check.

Q. That is the check of April 6th may contain a little more tremulousness than the instrument in question?

A. Yes, sir, it may, but it looks that way on account of the scroll there is here.

Q. I show you, Mr. Havens Plaintiff's Exhibit "H," being an instrument dated the 27th of May, 1890, and ask you to compare those two signatures and see how they compare as far as tremulousness is concerned?

A. You see the paper has something to do with that —written on this paper it naturally might be a little more tremulous than on heavier paper, the paper would naturally catch the pen a little. I think the one on the thinner paper a little bit more shaky.

Q. Which do you call the thinner paper, Plaintiff's Exhibit "H"? A. Yes, sir.

Q. Then you would say that that paper of date 1890, appears more tremulous than the signature in question?

A. Very slightly, yes.

Q. I show you Plaintiff's Exhibit "G" and ask you to compare the signature of that with the signature in question, and state which appears the more tremulous?

A. (After examining.) I think probably Plaintiff's Exhibit "G" does a trifle more. I don't believe I would call it tremulous. It looks to me as though this was written with a finer pointed pen than this one, and that would account for the little difference.

Q. Do you find any similarity in shading between Plaintiff's Exhibit "I" and the instrument in question?

A. Yes, sir, somewhat. On the "S" there, the down stroke is shaded. The shading in the "S" is rather uniform. It increases gradually and decreases gradually. I find the same characteristics in the disputed signature.

Q. Mr. Haven, from your knowledge of signatures and handwriting do you find that, as a man advances in age and sickness overtakes him, those conditions have any influence upon his signature? A. Yes, sir.

Q. Would advancing age and sickness account for the tremulous conditions that you notice in some of these signatures?

A. Well, a man might be at certain parts of the day more tremulous than at others, or may have been taking medicine, or something, you know, to cause that.

Q. In other words, under some circumstances a well man might write a very tremulous signature, might he not? A. Yes, sir.

Q. But I mean an ordinarily tremulous signature, as you see it, in the usual business transactions, could that be accounted for by the fact that a man was of advancing age and ill?

A. I should say it would make a difference.

Q. Were those signatures of J. W. Smith that I have shown you now, from 1885 to 1890 and down to the time almost immediately prior to his death—in those signatures do you find a gradual increase in the tremulousness of the signatures?

A. Well, I didn't notice the dates of those checks, or arrange them in chronological order.

Q. The checks ranged from April 2d up to October 2, 1895.

A. Some of these are more tremulous than others.

Q. One that you picked out as being the least tremulous of all was dated April 6th. Did you notice some dated after April 6th that were quite tremulous?

A. I didn't notice the dates.

Q. The ones of August 15th and 19th were called to your attention?

A. It was more so in those than in the other, yes.

Q. Then the ones of those dates appeared more tremulous than the one of April 6th. A. Yes, sir.

The COURT.—Does ink or pen have anything to do with the signature?

A. I think so, the pen; a sharp-pointed pen, or a pen that a person is not accustomed to write with, would be more tremulous than if he was writing with a smooth-

nibbed pen. If a pen caught a little bit in the thin paper, it might make it more tremulous.

Q. Do you mean to say that a stiff pen, and hard thick paper makes a stronger signature than a thin paper or a fine pointed pen? A. Yes, sir.

Mr. CANNON.—Q. For instance, if, on the disputed signature, at the time that signature was written, the paper was very thin and fine, the signature would be likely to be more tremulous? A. I think so.

Redirect Examination.

That which makes a signature tremulous depends upon various conditions.

The COURT.—Q. I call your attention to a letter apparently dated, Oakland, Cal., September 30, 1893, and ask you if that is the signature of J. W. Smith?

A. (After examining paper.) I think so.

Said document was offered and admitted in evidence for the purpose of the signature marked Plaintiff's Exhibit "L" and is as follows:

Plaintiff's Exhibit "L."

"Oakland, Cal., Sept. 30, 1893.

"Dear Daughter Laura: I hear, from others that Charles is actually coming out to California. I have written him suggesting he had better face the music & try & settle up his tangled affairs before he leaves. Don't you think it would be best. I have to a great extent settled up. I don't really own a foot of land in Cal. & only

one thing not disposed of. If you and Mary would only accept the Mansfield Orchard a part of which you paid me for in cash the other part as a donation out & out, no trust. If you do not I will not give it to any other of the family, but might give it to some charitable association here, and that would end it. I do not wish to do so. Your afft. father,

"J. W. SMITH."

C. K. KING, called as a witness for the plaintiff in rebuttal and being duly sworn, testified as follows:

My name is Charles K. King. I reside at Oakland, California, and have resided there about fifteen or twenty years. I am one of the defendants in this action and the administrator of the estate of J. W. Smith, deceased. I was appointed administrator a short time after his death. He died November 15, 1895. I had known him eight or or ten years prior to his death. I know the plaintiff, Charles H. Smith. He was the son of deceased. I was employed by J. W. Smith in his lifetime in the operation of the California and Nevada Railroad, and also in the mining business, building and loan in Plumas county. I was also employed by him to attend to him, to do certain things for him during his sickness. He paid me for it. I do not think these employments were continuous. There was a break, then another during the eight or nine years I knew him. I was in his employ probably four years, it may be more. I was in his employ during his last sickness. I suppose that continued four or five months. I went there every day, mostly every day and did writing for him. Wrote some letters for him and

brought him fruit to eat. He could not leave his room and such things as that, read him papers, and any little act he wanted me to do in that way. That covers over a period of about four or five months. I suppose it ceased at the time the regular nurse was hired, Mr. Cunningham. I did not go quite as often then as I did before. The nurse was employed about three months before his death, I suppose. At that time he was at Mrs. Stewart's house. He had been there for some three or four years before that. He had a room there. I believe he had the same room in that house always. He used it as a sort of office. He had a desk and table and a wardrobe there. He kept papers in his desk. Before he became sick I went there frequently for the purpose of transacting business with him. It was in the summer of 1895 before J. W. Smith died that he first talked to me about the disposition of his property. I suppose that it was some months or so before he died. A month or to before he died perhaps, Charles Smith, the plaintiff, came out from Denver during that summer. I think it was some time in June or July. I don't know which month until I refer to my papers. It was after Charles Smith had come out from Denver that he talked to me. He may have talked to me before that. I cannot say as to that. I really do not know. I think he talked to me on more than one occasion.

Q. You say you have in mind now one occasion upon which he talked to you. State to the Court what he said to you at that time.

A. Well, he said that he had given his property away to his children, that is, I don't know whether he said all of it; most of his property, I think he said, and that his son would have the—that he had given his son the railroad. I don't think I ever had any talk with him about what his interests were in the railroad.

Q. Did you ever have any subsequent talk with him about the disposition of his property?

A. I might have had. I really don't recollect. He talked to me two or three times about it, and it was about the same thing each time. I remember being cited in to the Superior Court of Alameda county to show cause why I should not place the bonds of the California and Nevada Railroad Company, three hundred and four bonds in the inventory of the estate of J. W. Smith, as property belonging to the estate, and of having testified in response to that citation.

Q. State whether or not Mr. J. W. Smith ever stated to you that he had parted with the bonds of the railroad, had given them to his son.

A. Yes, sir. I could not say when he made that statement. It was, as I said before, some couple of months before he died, I suppose. I recall the deeds having been made by Mr. Smith. I was sent to bring a notary public to his room to take the acknowledgments of such deeds. I was sent for W. R. Thomas, who was here yesterday. I do not recollect whether I saw the deeds after they were executed. I saw them, I think, before. J. W. Smith made several statements about the bonds. I think they were before I went to Mr. Thomas to acknowledge the

deeds, and probably after, also. I cannot recollect about that. I was not an interested party in any way. It was by reason of the statements made to me about the bonds that I did not put the bonds in the inventory of his estate. What he said and what his son said also. I believed them. The bonds have been inventoried in the estate. It was immediately after the order of Judge Green at the instruction of Judge Green to me, to have these bonds inventoried into the estate, and the appointment of the appraiser. Bonds were appraised. At the time of or immediately after the hearing on the citation a demand was made on me regarding the bonds by an attorney for one of the heirs. I don't know whether it states one or more of the heirs. A written demand was made on me to endeavor to bring into the estate these bonds, and also offering to furnish him money, costs for the same. Mr. T. C. Judkins was the attorney that made that demand. That was just before or after Judge Green ordered an appraisement of these bonds. It took several days in the court, and I don't know exactly when. It was some time in 1900.

Mr. BOLTON.—Q. I will call your attention to a letter dated November 6, 1895, and ask you if that is in your handwriting (handing)? A. Yes, sir.

Q. Turn it over to the back. Is that in your handwriting also?

A. Yes, sir. That was written in Captain J. W. Smith's room at his boarding-house. It was written at his instance, at his dictation. It was all written in the room. Mr. Smith kept two or three bottles of ink there,

and he had blue ink and black ink and pencils there. He always had two or three bottles of ink there and different colored ink.

Said document was thereupon offered in evidence, the part in pencil marked Plaintiff's Exhibit "M," and the part in ink marked Defendant's Exhibit No. 22 and read as follows:

Plaintiff's Exhibit "M" (in pencil).

"November 6, 1895.

"Dear Son: Yours of 3d inst. to hand. I notice all you say. You say you will be with me shortly and that you are getting things in shape to leave and that you can come at a moment's notice, etc.

"Well, do not expect me to give the notice, my peculiar feelings as you say belong to me as well as other people's feelings.

"I will never request you or any others of the family to come to see me in my condition knowing that they cannot help me.

"Come when you please if you please. I have asked Mr. King to write the foregoing and now tell him to write what he thinks proper on his own account.

"Your afft. father,

"J. W. SMITH,
Per K."

(Reverse side:)

Defendants' Exhibit No. 22 (in ink).

"Dear Sir: Your father dictated the above and told me to say what I pleased and not to tell him what I did say. I know that he wants you to come out that which he says to the contrary notwithstanding. He said to me this morning "Well, if Charley is all ready to come why don't he come." He seems better this morning than he has been for couple of days. He asked for the "Call" and read the paper, something he has not done for two weeks. I drew check for $100 for Capt. Thomas this noon. I have not kept his day book posted up as he directed me to just lay the papers in the desk.

"Your truly,

"C. K. KING."

There was more than one kind of ink there most all the time I knew him. He liked a certain kind of ink. Other people didn't like it. I often objected to the blue ink on account of the paleness of it. I never used it myself.

Cross-Examination.

He seemed to like blue ink. I think he wrote a good deal with the blue ink.

Q. You said, in answer to a question of Mr. Bolton, as to whether or not you had ever heard J. W. Smith say he had given the bonds to Charlie—you answered in the affirmative. I will ask you if the fact as you have stated and explained several times heretofore, the statement was that he would give or had given the railroad to Charlie, and not the bonds?

A. Coming to look at my testimony, which is nearer the time of his death, I find that I did testify bonds, and I think he did say bonds.

Q. You stated last Tuesday, Mr. King, did you not, when your deposition was taken in Oakland, that he did not say "bonds" but said "railroad"?

A. He said "railroad," and then when my testimony in the Superior Court was brought to my notice, I think I said, "He may have said bonds; that he did say bonds."

Q. Your testimony in the Superior Court was read over by you, Mr. King, before you gave your deposition?

A. Not before. During the deposition, it was done to refresh my memory I think, in several instances.

Q. After you read that over, you still stated, did you not, that the statement was that he had given to Charlie the railroad?

A. I don't really recollect now what that statement was; he had several interviews, as I say with me about it.

Q. He did not own the railroad?

A. Yes, sir, he was operating the railroad. He had a desk in his room and writing materials there and had paper, writing paper and note paper and envelopes. He had different kinds of paper there. A good deal of it. He generally bought a quantity at a time, a good deal. It was paper without heading, such as I have written on in the exhibits here. I think it was what was called letter size. Such as I have written on here in Defendants' Exhibit No. 22.

Q. I will ask you if you did not testify in the Central Bank in Oakland, a week ago last Tuesday in your deposition that was taken there, as follows: "Q State whether or not J. W. Smith ever made any statement to you about his property affairs or a disposition he had made of his personal property?

A. Yes, he talked about it several times. He said that he had given some of his pieces of ground to his children, and that Charlie would have the road, the railroad. I don't think he mentioned bonds to me. He said the railroad, that he had given Charlie the railroad. I don't think he mentioned the word 'bonds' to me. I think he mentioned the railroad." Is that correct?

A. I did testify in that way.

Q. Is that correct?

A. Yes, sir, it is correct partly, and partly, perhaps, not. I testified, I think, in the Superior Court that he did say bonds at one time—he had several interviews with me, and he may have said bonds, and I think probably he did.

Q. You just think probably he said bonds?

A. Yes, sir, I am almost certain he did at one time; I don't know which time it was. I didn't burden my memory with those, things because I thought the estate was about settled up, and there was nothing more in the estate. I never paid any attention to it, never attempted to retain in my memory any of these conversations, because it was none of my business and I was not interested in any way. My recollection is dim as to the exact way he put it, his exact words. The substance of the

conversation is correct. My present impression is now that he did say bonds.

Q. And you have obtained that impression since your deposition was taken a week ago last Tuesday?

A. About that time I think you produced there at that examination my evidence in the Superior Court of Alameda county, and I read it over carefully, and I said that was correct.

Q. But you then explained, after reading over the testimony there that you were still of the impression that it was the railroad that you were referring to in that testimony?

A. The railroad meant the bonds; the railroad meant everything that went with it.

Q. I call your attention now to part of the deposition or testimony that you gave. There is this question quoted from your former testimony: "Q. And all you know about it is what the old gentleman said and Charles H. Smith said? A. Yes, sir. He said he had no further stock in the California & Nevada Railroad, no stock or bonds; he had given it to his son." When your deposition was taken, did you call attention to the word "it," and explain that by using that word "it" you referred to the railroad instead of to the stock and bonds?

A. I don't recollect what I said there, independent of this evidence.

Q. Do you remember that word "it," calling attention in your testimony to the word "it"?

A. Yes, sir, I recollect the California & Nevada Railroad, and the stock and bonds.

Q. I speak particularly with reference to the word "it" now?

A. I don't. I haven't really—I know that his son told me that he had the bonds of the railroad several times, as well as the old gentleman.

Q. I call your attention to the following question and answer: "But you made no effort as administrator of the estate to try to look it up and get it back to the estate, have you?

A. None at all, because Mr. Smith told me himself he did not own it, it had passed out of his hands." I ask you if you called attention to that after reading it, and stated that you referred to the railroad?

A. It was natural enough that by using the word "it" I referred to the railroad.

Q. And that is the way you explained that at that time? A. Yes, sir.

Q. What proceedings have you taken in this matter, Mr. King, have been upon the demands of the heirs and pursuant to the orders of the Superior Court of Alameda county, have they not—in the matter of the recovery of the bonds? A. I haven't taken any action, sir.

Q. That is, the notice to the California Safe Deposit & Trust Company not to turn over the bonds?

A. Yes, sir. On that question by direction of the Court, which I considered very good advice, and also by the decision of the master in chancery.

Q. Those and matters that have come to your attention subsequently to your original action in not attempting to recover the bonds?

A. Yes sir, I generally ask the advice of the Court as to my actions in the estate, and he so advised me here.

The witness was here examined on behalf of defendant as a witness in surrebuttal.

Mr. CANNON.—Q. I show you now Plaintiff's Exhibit "G," and ask you if you ever saw that document before?

A. I saw that at the Central Bank only a few days ago.

Q. Did you ever see it prior to the day of the taking of Mr. Palmanteer's deposition in the Central Bank of Oakland? A. I did not.

Q. Did you ever hear of its existence?

A. I did not.

Q. Did anybody ever tell you of its existence?

A. No, sir. I saw it at the taking of Mr Palmanteer's deposition at the Bank a few days ago, when Mr. Bolton was there and introduced it.

Mr. BOLTON.—Q. State whether in your opinion, that is the signature of J. W. Smith?

A. I should say it was, leaving out the exception of the straight cross to the "t," which I never knew him to make He made a twirl around his name, and I have never seen his name written in any other way, but the letters are formed in exactly the same way.

The COURT.—Mr. King, the question is whether that is his signature, or not. There are no exceptions in a question of that sort.

A. I would not say it was not, and I would not say

it was. I don't like to testify; I could not positively testify if a man wrote his name exactly as he has always written it, that it was his signature. But it looks like it.

Mr. BOLTON.—Q. You have testified on cross-examination regarding paper in the room of the deceased, J. W. Smith. State what the habits of the deceased were as to keeping scraps of paper?

A. He always did that. He cut a good deal of paper out of unused blank books, and he had various kinds of paper there. He wrote a great deal with a lead pencil. He hardly ever wrote with ink himself during his illness. He was sitting up propped up in bed, and he would make a great many memorandums on different kinds of paper. He used to make memorandums on almost everything. He had some blue paper and some yellow paper, and sometimes old advertisements he would turn over and write on the back of, to make memorandums. I never knew him to use any uniform paper.

Mr. CANNON.—Q. I show you part of this Plaintiff's Exhibit "G" above the name "J. W. Smith," and ask you first if you know Charles H Smith's handwriting.

Mr. BOLTON.—We admit that is the handwriting of Charles H. Smith.

Mr. CANNON—You admit that all of this above the signature is the handwriting of Charles H. Smith?

Mr. BOLTON.—Yes.

Mr. CANNON.—We will accept that admission.

CHARLES H. SMITH, recalled in his own behalf in rebuttal, testified as follows:

I am the plaintiff and son of J. W. Smith, deceased. My father died on November 15, 1895.

Q. Do you remember where you resided at that time?

A. I had come out here to live at that time. In the summer of 1895 I resided in Denver and was in business there. I came out here that summer, the latter part of July. My father was at that time residing at Mrs. Stewart's, in Oakland. I had previously stayed at that same place. After I came out in July I had a conversation with my father about his property affairs. That was immediately after I came out in July. In substance it was in reference to the disposition of all of his property, real and personal.

Q. State whether or not there was any inventory or memorandum shown or given you by your father regarding that matter.

A. There was. That was in the fore part of August. He made a list of all of his real estate, with directions as to the various members of his family to whom he wished it deeded, and instructed me, after talking and discussing the matter, to draw up deeds to the various pieces of property, which I did. I have not these deeds nor that inventory. I have torn the inventory up, I presume. It was just simply a direction, and after the deeds were made, there was no occasion for keeping it, and it was destroyed. It was of no value at all. I have not had it since the deeds were drawn up. I drew up the deeds at my father's suggestion. I should say it was possibly a week after I drew them before they were executed. I cannot say the exact number of days. After they were

drawn up and prior to the time my father executed them, they were examined by him. They were examined the day before they were executed. It was on the 14th. The notary who took the acknowledgments was Captain W. R. Thomas.

Q. I now hand you Plaintiff's Exhibit "C," and ask you if you ever saw that paper (handing)?

A. Yes, sir.

Q. That is in your handwriting? A. Yes, sir.

Q. State the circumstances under which it was written.

A. It came about in this way: The afternoon before the signing and acknowledgment of the deeds, father asked me to bring him in the deeds, or to give him the deeds, and he read them over carefully, and we compared them with the list which had been made out, and he said, "Well, that is all right; we will fix up the matters," or words to that effect. The next morning—that was on the morning of August 14th—he said, "Charlie, let's fix things up." And as he was lying in bed, he handed me a scrap of paper and he said, "Write a bill of sale upon that," which I did. I remember it very well, for the reason that it was on a small piece of paper. He dictated the substance of the assignment to me, and when I had it written he said, "Let's see it." He looked it over, and he said, "That's all right, I guess," or something or other; I don't remember the exact words. Shortly after that he got up, went over to his table without the aid of a chair, as he usually had—he had the cane there, and once in a while he would go over to the table

or walk a little all around the room. He sat down at the table, and he wrote his signature to it. Then he took it up and he said, "Well, *that* a pretty good signature," and handed me the paper. The afternoon of this day, or about noon, I guess—well, it was some time during the day—Captain Thomas came in and took the acknowledgments of the deeds. He told Captain Thomas, he said, "I don't own a thing in the world. I have made disposition of all of my property. I have deeded away my real estate and my stocks in the mining companies, and the bonds of the California & Nevada Railroad Company I have given to Charlie."

Q. State whether or not that was in the same condition then that it is now?

A. I pasted that paper on the back of it. I think that was two or three years after the death of father. This was becoming considerably worn by reason of my having it in my pocket-book so much, bringing it out here, and to preserve it I pasted it on this white paper—I think it was a receipt, or something of that kind, if I am not mistaken. After that I remained here until the second or third of September. During the time I was here Abner Doble visited my father. It came about in this way: Father and myself had discussed the matter of the disposition of his property, and he was particularly desirous of avoiding litigation and having everything fixed before he passed away and in connection with the bonds, I spoke to him about this bill of sale, and he said, "Charlie, I'll fix a better way than that," or something or other, I don't know just what; "I will tell Mr. Palmanteer, Mr. King,

and Mr. Doble what disposition I have made of these bonds, and I will direct Mr. Doble to give you these bonds. I want you to go over and have Mr. Doble come here to my room so that I can tell him that I have given you these bonds." Mr. Doble came in response to the request of my father. I had requested him myself to call. I was present when he called. He came there in the room and talked on various matters, and while he was there, having been confined to the room very closely, I asked Mr. Doble if he was going to stay some little time and he said he would, and I went out. I left the room and went out for a walk. I was gone some little time. I don't remember now, and when I came back Mr. Doble had gone. Some time after that father told me what he had said to Mr. Doble, and he said, "Charlie, I have given Mr. Doble an order to deliver you these bonds, and told him that they belonged to you. That I had given them to you." During the time I was out here I made a deposit in the Central Bank. That was in the month of August. The circumstances were, that father was needing money, and inasmuch as he had disposed of all of his property, giving me the stocks and bonds, he would need money for the carrying on of these various things and for his personal needs. For that reason I opened a joint account in the Central Bank, subject to the check of either, and I left on deposit in the bank there $2.500.00 on the 26th of August. The money was obtained from Denver. I gave my personal check on my Denver bank, which I have with me. I went east some time early in September. I returned about the 10th or 11th of Novem-

ber. I have heard the testimony in regard to the receipt given by me to Mr. Doble. I received the bonds in controversy on that date. I came over to Mr Doble's office for the purpose of getting the bonds. I asked Mr. Doble if he had an order from father and instructions to deliver me the bonds, and he said he had. We then left his office and went to the safety deposit box—I don't remember just where they were—it was down in a basement, I remember of going down in the basement, and I got the bonds. We talked some little time down in the vault, came out on the street and walked leisurely down Market street, stayed there a little while, and Mr. Doble asked me to come down to his office. I went down to his office and we sat down about fifteen or twenty minutes to chat about various things. Then Mr. Doble suggested that he had better take a receipt. I said, "All right," and he dictated the receipt to his typewriter or stenographer, who was then in the office, and gave it to me to sign. I said, "How do you want me to sign, Mr. Doble?" "Well," he said, "inasmuch as I have given a receipt to Mr. J. W. Smith, you had better give me a receipt in J. W. Smith's name." I said, "All right," and I signed it J. W. Smith, by C. H. Smith.

After that the bonds were in my possession up to the time I placed them in the California safe deposit vaults. I received at that time an order for seventy-five bonds. That order was sent to the Central Trust Company of New York to obtain the seventy-five bonds. It was a requisition given by the company to father for seventy-five bonds on account of construction work. I afterward

received those seventy-five bonds from the trust company in pursuance of that order. I received them by express. After my father's death, I got the checks that were drawn against the account at the bank. I have some of them with me in San Francisco. Not in my pocket now.

Cross-Examination.

Plaintiff's Exhibit "G" was written in my father's room, on the 14th day of August, 1895. I do not think there is any question about the date. He was in bed at the time and handed me a slip of paper. I think that slip of paper was of the same size and dimension as the piece introduced in evidence here.

Q. Do you know whether or not it was?

A. Oh, I will say this. It might have been a little larger, perhaps it was a little larger, or probably it was a little irregular. That is all I can tell you. I cannot say that it was rectangular in shape the same as it is here. I cannot say that it was folded. I don't suppose it was. I don't think it bore any evidence on its face of having been folded.

Q. Did you cut it down with any scissors or any other implement after that?

A. I don't know whether I did that or not. I don't think I did. When I wrote it I sat either at the desk or table. Which it was I could not recall, they were right close together. Sometimes I would write at the desk, and sometimes at the table. That was the same way with my father. My best recollection is that I sat at the desk. I generally did the writing at the desk, when

I wrote in father's room, and he generally at the table. But I could not say for a certainty whether it was at the table or the desk. My father sat at the table when he wrote his signature. That was in the morning. Possibly an hour after I wrote exhibit "G." I don't suppose anything was done with the pen or ink in the meantime. I don't remember whether or not a bottle was used at the time I wrote it. I don't think father used a blotter, though I can't recall. I don't know whether we used the same pen and the same ink, or a different pen and different ink. I don't know what kind of pen he used. He used all kinds of ink, but I don't remember as to the ink at that particular time. He was sitting at the table when he wrote it. He probably sat there for an hour or more. I didn't notice particularly how he held the paper in front of him. I saw him when he signed and saw him make the characters. I do not know how he was holding the paper on the table. It was right before him as he commonly held paper, I suppose. I can't say just exactly how it was. I do not know whether he used a sharp pen or a stub pen. I have no recollection at all of the kind of pen, whether it was the same pen I used. I have no recollection what kind of ink he used or whether it was the same bottle of ink I used, or whether we both sat at the same table or desk. I pasted it on the paper upon which it appears to be pasted now, quite a while after the signing of it, possibly three years. In the meantime I had it back and forth. When I came out I generally had it in my pocket-book, and when I was at home I kept it in my safe.

Q. And you say you had pasted it on there because it was considerably worn? Will you point out the worn parts?

A. I can't do that. It was just getting sort of soft and flimsy by having been in my pocket-book and hands. That is all. I do not know whether it would wear first at the edges or not.

Q. Just look and see if you can see any sign of wear on it?

A. I don't know of any particular part that is worn. It was just getting kind of flimsy, as I remember. I don't know that there is any particular part of it flimsy. No particular part of it attracted my attention as being flimsy. At the time my father signed that document he did not ask for any particular pen nor make any selection of a pen. He did not ask for blue ink nor any ink. It was on the table. I did not search for the memorandum of the deeds that my father wanted me to draw up. I made no search for that. Of the real estate to which I was directed to make deeds an undivided two-thirds of a block of land in Oakland went to me.

Q. That was the most desirable of all the property, was it not?

A. No, sir. That was all that was deeded to me. It is in the northern part of Oakland, what is known as block 3, Emeryville, probably you might call it part of Emeryville.

Q. Name the children of your father that were living at the time of his death?

A. Mary M. Clark, Laura W. Porter, Margaretta G.

Rice, Martha J. Hart, Annie K. Caypless, now Mrs. McLean, Albert B. Smith and Charles H. Smith. Margaretta G. Rice has since died, leaving issue.

Q. You say these deeds were signed in the afternoon?

A. I cannot say as to the signing in the afternoon. They were signed at or about the time that Mr. Thomas came. My impression is that it was about noon as I stated, but it seems to me it was in the afternoon. It was several hours after Plaintiff's Exhibit "G" was signed. The exhibit there was signed in the morning and Mr. Thomas came at or about noon or in the afternoon.

Q. I understood you to say along about 10 or 11, Plaintiff's Exhibit "G" was signed.

A. I didn't say 10 or 11. I didn't fix an hour. I can't fix an hour. I could not say with what kind of ink the deeds were signed. I could not say with what kind of ink the acknowledgments were written. I don't remember the color of the ink.

Q. Where are these deeds now?

A. They are, I presume all of them in Denver—probably. None of them are in this State.

Q. Can you produce those deeds?

A. No, sir; if I was in Denver I could. I can produce them by going to Denver. I cannot by sending for them, because some of them are in my safe, and no one has the combination to that safe except myself. I drew those deeds in my room at Mrs. Stewart's. I don't remember where I obtained the ink to draw the deeds.

Q. Mr. Smith while lying in bed handed you a slip of paper and said to write a bill of sale on that, did he?

A. Yes, sir.

Q. What other words did he say?

A. I cannot recall what he said. He just said, "Charlie, write a bill of sale on that," or words to that effect. That was the substance of it. Then I sat down and wrote it. He dictated it. I think he dictated the whole of it about as it is written. Lying in bed he dictated that document just as it stands.

Q. Did you have any memoranda or anything to refresh his memory.

A. Yes, sir, had an option contract there.

Q. Where did he obtain the option contract?

A. Had it there in his room.

Q. Where did he get it?

A. He was entitled to it.

Q. How did he get it in his hands?

A. He probably asked me for it.

Q. I am not asking you where he probably did.

A. I don't know how he got it then.

Q. You don't remember about that?

A. I know it was there.

Q. What do you mean by there?

A. In the room.

Q. I am asking you how your father happened to have in his mind at the time he was dictating from his bed the data necessary to draw up that paper?

A. I can only say that I assume on account of having the option agreement there.

Q. Then your explanation is that you assume because he had the option agreement in his room, he had the in-

formation from which to dictate this document from his bed.

A. Yes, sir. He delivered it to me after it was written. I cannot recall the exact words he used.

Q. You testified to some words this morning?

A. Yes, sir. I said he put it up and looked at it, and said something like this, "That is a pretty good signature, Charlie." Then I took possession of the assignment.

Q. Was anything else turned over to you at that time?

A. Yes, sir.

Q. What?

A. Some, well, in fact, all of his personal effects were virtually turned over to me at about that time, before I went back to Denver.

Q. I am speaking about that time. At the time he gave that assignment to you, did he turn anything else over to you?

A. No, sir, not right then. I should say Mr. Doble called within a week after the 14th of August. I remained there part of the time, and then went out for a walk and returned. After I came back my father said he had given Mr. Doble an order to deliver the bonds. At the time I went to Mr. Doble's to get the bonds I did not produce the assignment. At the time I was getting the seventy-five bonds from the Central Trust Company of New York, I did not produce the assignment. These seventy-five bonds were represented by an order on the Central Trust Company to deliver the bonds to J. W. Smith. Either Mr. Doble or Mr. Emery, I forget which, went down with me to Wells, Fargo & Company's office,

as I recall it, and the requisition was given to them for the purpose of getting the bonds from New York. Just the details in connection with it, I cannot recall. At the time I went to Wells, Fargo & Company to arrange for the delivery of the bonds I did not produce the assignment, Plaintiff's Exhibit "G." I testified as a witness in the Superior Court on December 15, 1898, on the matter of the citation in regard to the bonds. I do not remember as to the date. I testified in regard to these bonds and the ownership of them. I did not produce that assignment then.

Q. I ask you if, on that day in the Superior Court of Alameda County, in the matter of that citation, you testified as follows: "Q. At the time these deeds were signed and acknowledged here in Oakland, or at the time when you talked with him about the drawing of the deeds—at that time was there any property of his disposed of by him outside of the real estate? A. Yes, sir. Q. You can state what and how it was disposed of, what he did about it. A. All of his personalty he transferred over to me at the time that he drew up these deeds, which was in August. Q. That property consisted of stocks and some Narrow Gauge Railroad bonds, and the like? A. Yes, sir. Q. Were they delivered to you at that time by him? A. Yes, sir."

Q. Did you so testify?

A. I probably did. I have always considered that they were delivered over to me from the 14th of August.

Q. Did you testify as follows at that time and place? "Q. Was there any other stock besides those? A.

There was one share of stock in the California & Nevada Railroad Company. Q. That is all the stock he gave you? A. That is all the stock. Q. The bonds, how many did he give? A. Three hundred and four. Q. Of what? A The California & Nevada Railroad Co. Q. Of the face value of $1,000 each? A. Yes, sir. Q. Were the bonds and stock endorsed by him in your presence? A. The stock was endorsed; the bonds were not. Of course, there was no endorsement goes with them. Q. The stock was endorsed? A. Yes, sir. Q. By him in your presence? A. Endorsed and transferred long before he died."

Q. Did you so testify? A. Yes, sir.

Q. Did you testify at any subsequent time in the Superior Court of Alameda County?

A. I think not; I don't remember now. I was present for one session of the court when the matter of the ownership of the bonds came up.

Q. Did you produce the assignment at that time?

A. No, sir. There has never been any occasion for it. I intervened in the litgation in the Circuit Court of the United States for this district in the foreclosure matter, setting up my ownership of the three hundred and four bonds in question.

Q. You know of testimony having been taken in that matter, do you not?

Mr. BOLTON.—I will caution the witness that that is of his own knowledge.

A. Not of my own knowledge.

Q. You do not know then that testimony was taken in the foreclosure matter?

A. I have never been here when any testimony was taken?

Q. You have no knowledge then that the matter was ever heard before the master in chancery, or otherwise?

A. Since that time I have been informed, of course.

Mr. BOLTON.—For the purpose of saving time, I will admit that it was not produced, and that no evidence as to the ownership of the bonds was offered in that case except the production of the bonds.

The COURT.—Is that admission sufficient?

Mr. CANNON.—We understand that to be the fact, and are willing that that admission should go in evidence.

Mr. BOLTON.—If his attorney made a mistake as to not putting in other testimony—

Mr. CANNON.—Is that part of the admission?

Mr. BOLTON.—I do not know. That is part of the argument.

Mr. CANNON.—Q. Now, Mr. Smith, I show you a letter dated September 11, 1895, purporting to have been signed by yourself, and ask you if that is your signature (handing).

A. Yes, sir; that is my signature. Let me read it. I wrote that letter.

Said letter was offered and admitted in evidence, marked "Defendants' Exhibit No. 23," and is as follows:

"Defendants' Exhibit No. 23.

"Denver, Colo., Sept. 11th, 1895.

"C. K. King, Esq., Oakland, California.

"Dear Sir: Yours of the 6th and 7th to hand Glad to hear from you, but I still feel alarmed and uneasy as to father's condition. I am afraid we won't have him with us very long. Keep me posted about the California-Nevada. I hope that father will be able to get out of it. Ask him for me what he hears from the Shenandoah and Green Mountain.

"Very truly yours,

"C. H. SMITH."

Q. I show you now a letter dated Denver, Colorado, November 24, 1897, consisting of ten typewritten pages, and numbered, and with the signature "Very truly yours, C. H. Smith," at the end, and under that the endorsement "Mr. King, please show that to Mr. Sawyer, C. H. S.," and ask you if you wrote that letter?

A. That is my signature on the last page. I should say that is my letter. There is no question about it.

Said letter was thereupon offered and admitted in evidence, marked Defendants' Exhibit No. 24, and is so far as material in this case as follows:

Defendants' Exhibit No. 24.

"Charles H. Smith, 1613 Blake Street.

"Denver, Colorado, Nov. 24th, 1897.

"W. R. Davis, Esq., Attorney at Law, Oakland, California.

"Dear Sir: Your lengthy communication of the 21st inst. is just received. I am obliged to you for writing me

so fully. I am quite surprised at many of the allegations made by McSorley and De Golia. It seems to be the privilege, at times, for some attorneys to make untruthful and libelous charges. Mr. King was in my father's employ for several years, and I know that father always considered him honest. I do not, and am not prepared to believe at this time that he has done anything wrong, knowing it to be wrong at the time. He may have erred in his judgment, but it is my impression that whatever he has done in connection with the estate matters has been done at the discretion and with the advice of Mr. F. W. Sawyer, the estate's attorney. When all the testimony shall have been given in, it will then show, I believe, that everything has been done properly and correctly.

"Now as to the first item of the complaint against King and myself as to my residence in California, I have this to say: all the proceedings in connection with this matter were had after due consultation with Mr. F. W. Sawyer, the estate's attorney, and upon his advice, which he will verify, viz.: Before I left Denver, I rented my home for one year and made preparations to go to California to live for a time, and took my family with me, and eight trunks of wearing apparel and other personal belongings, with the intention of residing in California for the purpose mainly of nursing my father, hoping thereby to bring back his health and to prolong his life. I went so far as to look around for a furnished room in Oakland, but before all this could be accomplished, my father suddenly died in the fore part of November, 1895. Shortly after his death I moved with my family over to the Pleasanton

Hotel in San Francisco and engaged rooms by the month. In the latter part of December I returned to Denver only with the intention of remaining a short time and intending to join my family shortly thereafter. In March, 1896, I again returned to California and remained there until some time in July of that year, and only then and in that month did I give up my residence with the intention of again returning to Denver. It was my hope, desire, and intention in the latter part of 1895 to go to California, there to take up my residence for at least two or three years. As stated before, the main reason was to nurse my father and be near him, as he had requested me so to do, and the other reasons for going to California were personal and do not need to be elaborated upon, so you will see in this case, so far as fraud is concerned, there was no fraud intended or perpetrated at all. No one knows better than myself what I did do and what was my purpose. This can all be explained to you satisfactorily by Mr. King and Mr. Sawyer, a brother attorney, whom I would suggest that you see.

"As to the other matters of the property being inventoried at $9,090.10, and being sold for $4,482.50, I can say but little. However, regarding the sale of the property, I remember that Mr. King said to me that it was all it was worth, and that it was a fair and sufficient price for the property considering the condition it was in and also the great depression in value of all farming and other lands throughout California. It is my impression that he went through all the forms required by the Court, and that after due advertising and notice the property

was disposed of to the highest bidder, he, King, endeavoring to see to the securing of a purchaser, so that the property would not be sacrificed. I think that Mr. Sawyer watched all these matters carefully.

"As to King not instituting suits against members of the family I am of the opinion that he did not think it necessary and that all the property which was deeded to them came to them in a proper and legal way. At this time I cannot recall wherein the estate has any claim or action against Benham & Thomas. As to paying out unnecessary funds to the amount of $287, I cannot answer. King and his attorney can do so, and I presume that upon showing by them it will be seen to be correct.

"The item of interest on bank deposits there is absolutely nothing in. I do not believe that any interest on bank deposits was ever paid to anyone.

"As to the claim of $6,000 by Maurer, this surely is also wrong. He has claimed $200 and says he has a writing from my father in which father agreed to pay him $200 upon certain contingencies. I have repeatedly written to King and Sawyer that if the claim is just, it of course, should be paid.

"As to paying me items amounting to $1,274.86, I have this to say: All the items therein contained are correct, and were items which the estate was owing for, and items which my father had contracted for before his death, and which could not be stopped immediately at his death, and were items for which he and the estate were individually liable, all of which can be fully and satisfactorily explained. I have not kept a copy of the

items contained in this bill, but will write to King immediately for a copy. King knew this claim to be just for the reason that he was in close touch with father before his death and knew that it should be paid. I think that Mr. Sawyer did also.

"As to assessments on stock in mining companies, I also know that in the month of August, 1895, father assigned, transferred and delivered to me divers stocks in various mining companies with the particular understanding that he should have absolute control of said stocks during his lifetime, and that in consideration therefor, he would pay all expenses in connection with the same and all assessments levied during his lifetime. This can be very easily proven for the reason that *her* personally made several payments, particularly to the Shenandoah Quartz Mining Company before his death, and after the stock had been assigned to me. This I think King knows all about, and I think Mr. Sawyer does as well, for the reason that these matters were fully explained to him.

"As to the item of $300 for a monument, this is surely going too far. I think this item will speak for itself.

"As to the claim of J. J. McSorley, I have this to say: It was for labor and material contracted for by my father before his death. McSorley needed the money badly and requested me to advance the money to him, which I did, and he assigned his claim to me after the same had been allowed. This is as straight as a string and there is nothing wrong about it. It was not a claim against the Green Mountain Gold Mining Company. My father

was conducting the properties of the Green Mountain mine on his own personal account. The claim of Allen H. McCarty is exactly in the same box, and is as straight as a string. All this was contracted for by my father as an individual.

"The day following my father's death when my spirits were naturally disturbed and I was feeling in a condition peculiar to most anyone under those same circumstances, Mr. A. I. McSorley and some other gentlemen accompanying him called on me at the Metropole Hotel and then and there stated many things, all of which I cannot recall, but I can some. In the main, it had reference to the payment of notes made by my father to Mary F. McSorley for a piece of mining property which he had purchased from her. I assured Mr. McSorley at that time that I thought the estate would have sufficient property out of which could be realized a sufficient amount to pay his claim in full and all others and would probably leave a surplus. I also told him at that time what my father had requested me to do in the event of his death, and I have tried to follow it out quite fully. He then wanted to know particularly in regard to the disposition of father's real estate as to making out all the deeds and recording and the delivery of the same, and as I could see no reason for keeping anything back, and hoping and believing at that time that everything would go along without any friction at all, I told him of the non-delivery of certain deeds, and I also said to him at that time that I did not think he need give himself any uneasiness as I felt that his claim would be paid. I believed so for various reasons. I was in hopes it would not be necessary

to call upon any of the estate's assets to liquidate the claim of McSorley. I thought at that time I would be able to dispose of some railroad bonds which my father had given me, and in that event it was my intention to pay all father's indebtedness and thereby clean up the whole matter, but at a time when I could have sold the bonds and was at the point of delivering the same, some matters arose, especially that of litigation, and nothing can be done until this litigation is settled. I also told McSorley that my father was indebted to two of my sisters to the amount of $6000. Whether King knew of the circumstances of the delivery of the deed to Mrs. Porter and Mrs. Clark, I can say naught, but I am quite sure that McSorley knew, also Mr. Sawyer. At one time I told Mr. McSorley that my sisters would deed back the land, and I thought this would be more than sufficient to pay his claim. After one of my sisters, Mrs. Clark, had told me they would deed back the land, I wrote to him to this effect, but for reasons, and probably good ones, known to themselves only, they have decided not to do so. As a matter of fact, all the personalty owned by my father at his death belongs to me, and I have a paper showing that to be the case, and which can be pretty nearly construed as a will. The reason for appointing an administrator was for the purpose of cleaning up some matters which at that time, upon consultation with Mr. Sawyer seemed to be the only way out of the matter. I have turned over some little items to the estate, which Mr. King can explain to you, which as a matter of fact belonged to me. While it seems to be a rather mixed

up and nasty mess, yet, upon explanation of all matters it will turn out to be quite clear. I have no fears as to the outcome. Of course, naturally, being a son of the deceased and his having been very kind to me during his lifetime, I am quite anxious that the McSorley claim should be paid, and were I able at this time to liquidate the same, I would do so personally and thus end the matter. Sometime since McSorley wrote to me and wanted me to advise King to commence suit in his own name against certain heirs. I replied that I could not advise Mr. King in the matter, that he had his own attorney, and that for my part if he wished to prosecute the suit I would prefer to have McSorley join with Mr. King, for the reason that I felt that some of my relatives would think that I was pushing the suit with the complainant in the matter. This matter has been exceedingly unpleasant to me, and a very delicate one, for the reason that I do not wish to have any ill feeling between myself and my sisters. I was informed a few days after the death of father that by reason of my having in my possession the deed from father to my sisters, and having failed to deliver the same during his lifetime, that the said deed was null and void. It was not my intention to defraud the estate or to defraud creditors of the estate when I did give the deed to Mary M. Clark and Laura W. Porter, and I think that I can testify to the Court and justify my action in giving this deed to them after father's death. I do not believe that a big war is on, although it looks so from your letter. Certain matters are now under consideration between myself and

my sisters, which if consummated I believe will result in McSorley being satisfied, and in that event, DeGolia will not have a peg to stand on. While DeGolia represents McSorley, still he is mainly urged on by a disgruntled heir, knowing she will receive nothing, but DeGolia thinks he will be able to get something from some source. He is working on a contingency, and that contingency is, I am informed (reliably so), to be one-half of whatever he may get for his client. The said client did live in the city of Cincinnati.

"When it is absolutely necessary for me to come to Oakland, I will try to do so, but in the meantime, I wish you to have McSorley agree to a postponement. I believe upon a request to McSorley, saying that I wish it, that he will immediately request DeGolia to postpone it until I can be heard from. In the meantime I think that King should consult with his attorney, Mr. Sawyer, and have all work in harmony. It won't do for King to ignore Sawyer for various reasons. This would naturally displease Mr. Sawyer, and he might make it unpleasant for Mr. King.

"I will hand your letter to Mr. Porter as you have requested, and will also show him my letter in reply to yours, and if it is necessary to write you again, I will do so. I would suggest that upon receipt of this letter that you send for Mr. King, and arrange for a conference between yourself, Mr. King and Mr. Sawyer. I do not think that at this stage of the game that I would have much to say to De Golia. I do not see that we should give him any information whatsoever. With McSorley satisfied,

De Golia can go ahead, so far as I am concerned, to his heart's content. He will not have a leg to stand on. I I will be able to take care of myself without any trouble.

"Very truly yours,

C. H. SMITH.

"Mr. King: Please show this to Mr. Sawyer.

"C. H. S."

Q. What paper did you refer to Mr. Smith?

A. I cannot just exactly tell you what, that is, I know the paper. It was a paper which he had given to Mr. Palmanteer, another to Mr. King, and I think one to Mr. Benham.

Q. I show you now a paper headed "C. K. King, 902 Broadway, Oakland, Cal.," and commencing "Oakland, Alameda County, California, October 31st, 1895. Friends C. K. King and A. M. Benham," signed "J. W. Smith, Witness C. K. King," and ask you if that is the paper referred to (handing)?

A. Yes, sir. That is my father's signature.

Said document was offered and admitted in evidence marked Defendants' Exhibit No. 25, and is as follows:

Defendants' Exhibit No. 25.

"C. K. King, 902 Broadway, Oakland, Cal.

"Oakland, Alameda County, California, October 31st, 1895.

"Friends C. K. King and A. M. Benham: If the human mind should leave this body commonly called J. W. Smith, you will then say 'It is dead' and as usual in such cases should be buried in a tomb or grave—It is my desire that

you (conjointly) if you are well and alive at that time take charge of my remains (one not doing anything without the knowledge of the other unless one might be incapacitated from so acting.) First procure a lot in Mountain View Cemetery. Then arrange with Mr. Brown (undertaker) for a good red-wood coffin and have the corpse placed therein—clothed with a white muslin shroud (no made up—clothes) except a pair of socks, and one of my night shirts and then bury the body and coffin in the grave with as little show and expense as possible only employing 2 carriages and a hearse. And by no means allow the body to be removed to Colorado for burial.

"Have a trunk now setting in the hall of No. 408—13th street, Oakland, placed in the room that I had occupied, fasten all windows and put a lock on hall side of my room door and lock the same then take the key or keys of such lock to C. H. Palmanteer of Central Bank, together with the key of my tin box now in his bank which C. K. King shall hand to him to be kept by him until the arrival of my son C. H. Smith of Denver, Colorado, who shall receive the keys and all effects left by me. As C. K. King has been commissioned by my son to inform him of any change, and to take charge for him until his arrival he shall immediately wire him of the same and he will come out and pay all reasonable expenses.

"J. W. SMITH."

Mr. CANNON.—Q. Upon the occasion that you have mentioned, when you testified in Oakland in the Superior Court of Alameda County, did you testify as follows: "Q. You got a tin box from Mr. Palmanteer at the bank, didn't you? A. Yes, sir. Q. When did you get that?

A. Oh, I had that long before he died. Q. What was in that box? A. Well, a great many of his private papers, stocks, bonds, and so forth. Q. What became of those private papers, stocks, bonds, and so forth? A. There were some of them, some private letters, which I have since probably destroyed. Q. What became of the stocks, bonds, and so forth? A. I have them yet, sir. Q. Anything besides the stocks and bonds you have mentioned? A. No, nothing of any value at all that I recall. Q. You never turned these over to the administrator, any stocks or bonds, did you? A. No, sir, I never did, because they didn't belong to him, they belonged to me. Q. Your father gave all to you before he died? A. Yes. Q. Gave you the box, too? A. Yes, sir. Q. Was there deeds in this box, too? A. No. There had not been deeds in that box. Q. But the stock and bonds given to you were in the box? A. Yes, sir. Q. All of them? A. Yes, sir. Q. All this box contained was the Nevada Railroad bonds, Nevada Railroad share of stock, Shenandoah stock, and Green Mountain stock? A. Yes, and a gold watch, too. The gold watch was not in there, I do not believe."

Q. Did you so testify?

A. Yes, sir.

THEODORE KYTKA, called as a witness for defendant King in surrebuttal testified as follows:

I reside in San Francisco and have resided here about eight years. I am a writing expert and documentary photographer. I have been engaged in that business more or less over fifteen years, may be twenty. I have

had about twenty-two year's experience in photographing documents. I have had experience in the examination of handwriting as an expert since the trial of the Chicago anarchists in 1886. That was my first experience in the United States. I am a native of Vienna, Austria. Since 1886 I have made an examination of handwriting in many hundred cases. I have been in the Fair case, the Botkin case, the Quackenbush case, and in nearly every prominent case that has been here in eight years. I could not recall them. There are so many. I also examine handwriting for the United States postoffice inspectors, the San Francisco police department, and I am doing the State's work. I have had experience in the use of the microscope in examination of handwriting for about fifteen years, and with reference to the examination of inks in the neighborhood of twenty years. I determine whether two documents are written by the same ink. I have made a study of inks that are manufactured. I made a very exhaustive study in detail of ink. I make that a particular specialty. I have a microscope in court. It is the most perfect microscope known to the science of lens grinding and manipulation. It was purchased by the Fair Estate and given to me.

Q. I show you Plaintiff's Exhibit "G" in this case and ask you if you have seen that document before (handing)?

A. Yes, sir, that is his signature to it. I have made an examination of that document at the request of counsel for the defense. I have also seen Defendants' Exhibits Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, being checks bearing the signature of J. W. Smith. I

have also made a comparison of the signature to the disputed writing, Plaintiff's Exhibit "G" with the checks. I made a particularly careful study of the signature "J. W. Smith" to the checks dated July 30, 1895, August 16, 1895, August 15, 1895, August 19, 1895, and September 9, 1895, and October 2, 1895. In addition to that, I made a study of the other exhibits offered and signed "J. W. Smith." I find that the signature to this exhibit, Plaintiff's Exhibit "G," is written by J. W. Smith, but examining the signatures of the checks that I specified from July 30, 1895, to October 2, I noticed a particular tremor in the signature, which would indicate to me that the man was utterly incompetent and physically unable to have written this signature at that time, absolutely impossible under any conditions (referring to exhibit "G"), because the signature to this shows, judging from the ink, the signature must be somewhere between fifteen and twenty years old. Judging from the oxidation of the signature to an exhibit which was made in 1895.

Mr. CANNON.—Q. I show you now Plaintiff's Exhibit "J," dated 1885.

A. That tallies very nicely with this signature. I judge that the signature is a good many years older than the signature there specified. I find that the body of the writing is written in entirely different ink. It is blue black ink. It has not the sulphate of iron that the signature contains. The upper portion of it is written with a blue black ink.

Q. That is the body of the assignment?

A. Yes, sir; the microscope shows me that the signature is written with a dead black ink. In the blotted portion of it, it turns into a grayish brownish black.

Q. What portion particularly does it turn into the grayish brownish black?

A. Wherever there is a smearing; that is the safest mode of examining ink, by examining the blotted portion, or the smeared portion of writing.

Q. What do you find in that ink with reference to oxidizing?

A. That would indicate to me the drying and also the absorption of ink, particularly where the signature is already formed which shows that the oxidizing is well fixed. It takes a good many years to oxidize ink and absorb it into paper.

The COURT.—Q. Do you mean that the oxidation of the signature is greater than the body of the exhibit?

A. Much more. It is entirely different ink. The chemical constituents are entirely different. As to the oxidation the ink shows the precipitate form absorbed by the fiber, which shows it is of much longer duration *that* the above writing. Some inks age faster; and some inks according to where the paper is kept, according to the condition. Then I would state from my examination of seeing a great many documents, that this is in a good state of preservation, and the upper portion of the writing would indicate to my experienced eye, in examining disputed writings, that the upper body of it was written above the signature. There are several reasons for it.

Q. State them.

A. There is one in the beginning, the spacing of it; then the crowding, if you notice; then you notice that this is a first-class penman judging from his signature. If you take the space, you will note he began much lower over here (to the left) and dodged this signature (pointing to the signature of Plaintiff's Exhibit "G"). This space (over the signature) is much higher than from here (pointing to the left side of exhibit "G"). He dodged that signature. The lines go up here, showing that the signature was dodged. The body of the writing is raised, otherwise it would strike the letter "S." There are no lines or pencil lines on the body of the instrument.

The COURT.—Q. What is that (pointing)?

A. That is a pencil mark. You refer to this straight mark?

Q. Yes.

A. That is a crease in the paper. I will put it under the miscroscope or light. It shows the dash behind the figure "5," and also shows the crease. It is a natural crease.

Q. Now, Mr. Kytka, will you show the oxidation?

A. This shows the stroke in the letter "J" where the ink was out, and you will find black specks with light yellow stains, yellowish stains which are noticed on every old document, according to the keeping, some fifteen or twenty years. Old writings will always show their peculiar yellow lines on any kind of paper. You will not find that on the writing in the body of the instrument, because it is a different ink. It is a recent ink. This is a writing with a blue black ink. It is different com-

position, one giving yellow stains, and the other giving blue black ink. I find the oxidation I speak of in the document of 1885. It is noticed very plainly without the miscroscope.

The COURT.—Q. If that is on exhibit "G," if the writing is old, necessarily that is an old piece of paper?

A. Yes, sir, no doubt. I would state, aside from the ink, not taking the ink into consideration at all—here is a check of August 15, 1895, the day after. There is not a clear-cut stroke in that signature, or in any of these, and that is supposed to be written the day after. Here is one a couple of days before exhibit "G," one check dated August 6th, and one July 30th. These show around this time August 6th and July 30th, the nerves were in such a condition that he could not have written the signature, because there is a tremor and an angle on every stroke, in some of them a couple of days apart, he could not hold the pen before and after; that is only a couple of days apart, August 19th and August 15th. He could not make a clear-cut stroke. Another signature like that, a document like that cannot be produced with that freedom in it (referring to exhibit "J"). If there is another signature produced with a signature like it, I will be willing to change my job. I will drop my job, and never testify again, so certain am I that he did not write it.

Q. Do you notice anything in the edge of that paper, Plaintiff's Exhibit "G," to indicate that the paper had at one time been larger?

A. Certainly I do. It shows, your Honor, that this was a piece of larger size, because there is a bend, there

is a folding all along in the signature. You will notice that under the light. It is within an eighth of an inch on this side of the paper as folded—you see that crease. It took even the ink out from the "J." There is another folding in here, about three-quarters of an inch, and it was trimmed with scissors; it is clear cut. This is not a machine cut. With machine cut they cannot cut a crooked line. They have got to cut straight or not at all.

(The Court here examines under the microscope the disputed signature, and the signatures to the checks introduced in evidence.)

The WITNESS.—It would be much better to take it under a small glass. The magnifying power of this is so very great that I cannot get two of these lines in the field. Your Honor will notice the down stroke of the letter "S" in both of them. You will note the one here shows angular lines, and the other shows a clear definition, a clear-cut line. One shows angularity and the other shows clear-cut lines.

Q. Mr. Kytka, would you say that the clear, well-defined lines that you find in the disputed signature correspond more nearly to those lines in the signature of the document of 1885?

A. Yes, sir, and thereabouts; 1885, and somewhere along there.

Q. And one document of 1890?

A. Somewhere there, yes, sir. There is not a single signature in these checks that I have specified showing the sweep and freedom that there is here—not even an approximation to it.

Q. But you find that sweep and freedom in the early signatures shown you?

A. Yes, sir. The lines are very clear-cut in the earlier signatures.

The COURT.—Q. You mean that there is a rather free sweep of the pen?

A. Yes, sir. It is much similar, but shows great control in the handling of the pen.

Q. Did you also examine Plaintiff's Exhibit "H," dated 1890?

A. Yes, sir. That shows a wonderful sweep. There is a firmness about the strokes that cuts clear to your paper.

Q. Do you know what kind of paper was used originally in Plaintiff's Exhibit "G"? What is the texture of that paper?

A. (After examining paper.) Your Honor, this paper, in my judgment, after an experience of nearly twenty-five years in examining papers, I would state to be taken from a book cover, indicating that it is for printing, just like the name sheet in a book. It is not writing paper; it is printing paper. The texture of it shows that it is a printing paper. It is thin.

Q. If you were to take a document of that size, and a person were to sit at the table with a document not larger than that, and with that character of paper, what would probably be the effect upon the signature, that is, with special reference to a small piece of paper? Could a person write with the freedom with a small piece of paper only before him, as with a larger piece of paper?

A. If it would have been on only a small piece of paper, there could not have been the freedom shown in the signature. But the writing, the lines themselves, show me that there must have been a hard underlying substance, a good surface for the pen to sweep over. I would consider that the paper might have been in a book.

Q. In the fly-leaf of a book?

A. Yes, sir. The texture indicates to me that it is a common printing paper. Judging from the appearance of the document I would say the body of the writing was written after the signature.

Cross-Examination.

Mr. BOLTON.—Q. When were you first spoken to about this case?

A. I received a telephone, I believe it was Saturday —I don't recollect whether it was Saturday or Monday— from Mr. Judkins. I subsequently had an interview with Mr. Judkins. He asked me what were my charges for examining a signature to a document. I told him it depended entirely upon how much work it was. Whether I had to photograph it, or to go through a couple of hundred checks, or a couple of thousand checks. I told him fifty dollars for photographing and examination—not for testifying in court, for which I charge twenty-five dollars per diem. Then for my services in this case I am to receive seventy-five dollars. I have not been paid. I am not in a hurry to get the money. No arrangement was made. Whenever they pay me it is all right, in a month or a year, it is all the same to me. There was no

arrangement that I was to wait until the case was decided. Absolutely no discussion upon that subject. I never saw Mr. Judkins in my life before that interview. I did not have a conference with anybody else. Mr. Cannon walked in and shook hands with me. That is all I have had to do with Mr. Cannon. I do not know Mr. Shurtleff. I just met him yesterday. I first saw the document this morning. I did not photograph it.

Q. Did you make any inquiries at all about getting your pay, how sure your pay was?

A. No, sir; it is a small amount; twenty-five dollars or fifty dollars is nothing to me.

Q. Those small amounts do not interest you at all?

A. They do if they come all right, and if they do not come, I am not going to kick about it. I do just what my science tells me, and I am too independently wealthy to depend on fifty dollars.

Q. What did Mr. Judkins say to you?

A. He said he wished my presence in court to examine a certain writing if it was produced. He did not tell me where I could go and see it if I wanted to.

Q. Did he say whether he was going to produce it, or not?

A. No, sir; it was not in his possession; I knew that.

Q. You knew it was not in his possession?

A. Yes, sir.

Q. Did he tell you what he thought about it?

A. That he thought it was a darned forgery.

Q. And he wanted to get your opinion to see if he would think so?

A. He disputed first the signature. As soon as I saw it, I put him at rest, and told him it was the genuine signature of Mr. Smith, and there was no getting away from it.

Q. You told him there was no doubt about the signature, at all?

A. Not the slightest in my mind. A man that could forge writing like that would not be fighting for bonds; he would be worth millions.

Q. Why did you think the writing was his?

A. Because I was asked to examine it and examined it. My first duty is to examine it to see whether it is the writing or not. I examine all the details pertaining to a disputed document. I was led to think it was Mr. Smith's signature from the characteristics existing in the previous writing, and the characteristics found in the signature on the exhibit. I can tell the different makes of ink by examining them. I could not tell you whether they were home-made, but could tell you with absolute certainty whether two inks are alike without applying the acid. I can tell what particular brand of ink it is. I have got every kind of ink ever introduced in the United States.

Q. How close can you tell the age of writing—within a year?

A. Oh, no, that I could not tell. I could not tell within a year, because it depends entirely upon where the document is kept, how it is kept, and what the chemical effect—whether the alkali or the acid will turn—whether it contains more or less glycerine, and more or less sugar and gum. When ink stands in the open air it thickens.

To some extent that has some effect upon the writing in determining the age of it. It won't corrode so fast, won't make a precipitate so fast, because the air has to act on a greater amount, the lower the ink. Fresh ink out of a bottle operates faster than ink that has been exposed to the air and thickened in the bottle. It will produce an oxidation faster because the atmospheric changes do not act on the underneath layer of the ink as fast as on a thick layer of ink. Do you understand me?

Q. Does the exidation go on before it spreads, while it is exposed to the air in an ink bottle?

A. There is no oxidation possible in an ink bottle. It has to be dried first. You cannot form a precipitate with it in a wet state.

Q. If the ink has once become dry and set for a number of years, and then again is moistened and used, what would be the effect of that ink?

A. You could not write with it at all.

Q. You could not write with it at all?

A. No, sir; not very well. You could not produce that signature. If ink dries up entirely, and then water is put in it, and it is allowed to stand some reasonable length of time, you could not write with it very well, not with freedom because you could not dissolve the particles. It would show under the microscope like rocks, that the ink was once dry. There is no expert in the United States claiming to tell the age of ink absolutely. I can tell the age of ink to some extent. It is not guess work. It is based on facts existing and found on the document. On Plaintiff's Exhibit "G," the words "J. W.

Smith" have been written there fifteen or twenty years. I could not state how long the other has been written, but that is subsequent. There is no oxidation, absolutely, about that (referring to the body of Plaintiff's Exhibit "G"). I would state that it might have been written somewhere around in the neighborhood of five or six years, may be four years, even as low as three years, because there is no oxidizing yet on any stroke.

Q. It may have been written within a year?

A. I would give it more than that. It is pretty well dried out for that.

Q. May it have been written within a year?

A. No, sir, I would not state that, because it is pretty well dried out. It is not the ink that the expert bases his opinion on, it is the paper; the fiber absorbs certain particles of each and every ink, and then the atmosphere acts on the surrounding particles and the surrounding sides of each stroke. It is very difficult for an expert, without attempting to illustrate it very technically, to give all his reasons for that. But it can be absolutely demonstrated whether two inks are written at the same time, and are of the same age and of the same quality. You take an alkaline that I may select within a few hours' examining, and you make a standard solution, and you take two quills and dip alkali and acid in each quill and place over the stroke disputed, and you can identify them both. You must have the same precipitate on both, and therefore it may be reddish brown under the acid, and purple under the alkali. But they have got to resolve at the same time, within so many minutes. If one

resolves first, it shows that ink is not as old as the other which resolves slower.

Q. There are different kinds of ink?

A. Yes, sir, something like 250. If one ink is of one particular character, for instance, red, and it dries out, and you dip the pen in a black ink, you will get two inks. That can be easily detected under a microscope. You will get a brown black, and the microscope will show a lustre and the little crystals that you notice in the dies. It is very simple to me, because I have made an examination of it many times.

Q. It is just as easy to tell the age of mixed inks as of straight inks?

A. Not always. When there are two constituents of ink very closely related to each other, say, for instance, if he has got a base of red prussiate in one, and the other has protosulphate of iron as a base for coloring, then you can tell, yes. But when you take two inks of the same character, say one that has got a weaker protosulphate of iron base and the other a stronger quality, you cannot tell them very well.

Q. What makes you think this piece of paper came out of a book?

A. I can tell by the quality, the finish of the paper, that is used for printing.

Q. You have not any doubt that it came out of a book?

A. Oh, no, I would not say that. I have no doubt that it is not writing paper; it is printing paper. I referred his Honor only to the fact that paper of that character is

used in printing books. It might have come out of the flyleaf of a book. I suggested that because I have seen that used in fly leaves of books many times before.

Q. Judging from the mesh of the fibre of this paper, you come to the conclusion *that that once* the flyleaf of a book, do you?

A. Yes, sir. I wanted to express it that it might have been used in the flyleaf of a book. I have seen paper duplicating identically in fibre and texture this paper, used in the fly leaves of books. I have seen such paper elsewhere. I have never seen it in any closets, but I have seen it in stores where they sell paper. I make a special study of paper, ink, and pencil.

Q. What is the name of that paper?

A. As I said, if it were separated there, so that I could close my eyes and feel of it apart from the piece it is pasted on to, I could tell you just exactly the weight of it. Paper goes by weight. I can't tell because it is pasted. I can't put my finger on the other side.

Q. Do you have to tell the weight of paper to tell the kinds of paper?

A. Nearly every time when it comes to printing paper. The expert on paper will tell you whether it is 60 pounds or 80 pounds, or 90 or 120, just by closing it between his thumb and finger.

Q. Do you know how to designate the manufacture of that paper, as to how the paper is formed?

A. That is entirely due to the calandering. It is a pulp paper composed of wood. I am positive of that. I can see the wood under the microscope. I can show it to

you. There is some sizing in the paper. A pen would write freely on it. There is no danger of blotting in using that paper. Not what I consider microscopic blotting. This paper is not as well sized as linen paper. If you will examine the upper portion of it you will find that the pen was a much finer quality that wrote the body of it than this one. Why? Because the pen cut into the paper and absorbed fibre, wood. Your Honor, this pen was much finer than this, because it cut into the paper, and you will observe between the two nibs some ink went out and made blotting—that is not blotting, but it is the breaking around of a small particle from the wide track; that is not blotting.

The COURT.—Suppose you should write on this blotter. Is that what would occur?

A. Exactly like that, because it is not any different.

Q. Does not the ink, after it strikes that paper, just distribute itself as water would?

A. Yes, sir, the paper absorbs it, because this is very porous. But that is not the case here (showing).

Q. Is this porous?

A. To some extent, but not as much as blotting paper. Flyleaves of some books are porous to some extent. So is this one porous.

Q. Is that not one of the difficulties of writing a name in the ordinary flyleaf?

A. No, your Honor, speaking of the modern papers, up to within a few years, they put more starch in, and that starch absorbs and fills it, and makes it much more

difficult to write on. It is due to the calendering. That is my technical explanation.

Q. I merely want to know whether or not it is not a fact that in the ordinary book you purchase at a bookstore, the paper of the flyleaves is not of such quality that the ordinary writing distributes the ink around it?

A. Yes, sir, that is to some extent true.

Mr. BOLTON.—Q. Can you tell me who the maker was of the ink in the body of this exhibit?

A. I cannot. I am not prepared to do so. I cannot tell you who the maker of the ink in that signature is. I did not examine it with that in view, at all. I have recorded some 250 inks here, and I could endeavor to find out whether it is a modern ink.

Q. I believe you testified that you could tell the physical condition of a man by his signature, did you not? A. Yes, sir, every time.

Q. That is, as to his age? A. No, sir.

Q. What difference is there between a man who is nervous in his writing and a man who is drunk?

A. Very little. When I refer to the physical condition I mean the state of the nerves. By a man's signature I can tell whether he is a young man or an illiterate man or of fixed habits. That is all.

Q. Look at that signature without looking at the date. Tell me in your judgment how long before Mr. Smith's death was that written?

A. I cannot tell that; that is impossible.

Q. Is that a pretty steady signature?

A. No, sir.

Q. Not a steady signature?

A. No, sir. That shows a touch of wrecked nerves.

Q. Is there more of that in that one than there was in the other checks shown you?

A. That signature is very close to that.

Q. It is very close to that?

A. Yes, sir. Now, let us see the date.

Mr. CANNON.—I think we are entitled to have it marked as an exhibit, your Honor. (Mr. Bolton withdraws the paper and does not offer it as an exhibit.)

Mr. BOLTON.—Q. How far apart were those signatures (showing)?

A. I could not tell you, but there is a touch also in that.

Q. There is a little touch in this one (showing).

A. Yes, sir.

Q. And a good deal more in this one?

A. Yes, sir; there is more in this.

Q. This was probably written after he grew weaker, was it? A. I cannot say that.

Q. Now, let us see. That is April 21st, and this is October 7th? A. Just what I said.

Q. But that is the later one. That is the one you said was the best?

A. That has got wrecked nerves, also. If your Honor will examine the J. W. Smith there and compare it with this (Plaintiff's Exhibit "G") it cannot compare with it.

Redirect Examination.

Mr. CANNON.—Mr. Kytka, you said something about inks aging more slowly according to the place and conditions under which they had been kept. If a document or signature has been kept in a safe, away from the light and the action of the air, to a certain extent, will it age more slowly than if exposed to the light?

A. Certainly, much slower.

Q. Then a document kept very closely in the safe or very closely in a person's pocket-book would be likely to show age less quickly and have a fresher appearance than if exposed to the air?

A. Yes, sir. The idea is, that you have got to keep away from ink the effects of heat, moisture, and cold. The changes have the biggest effect. In some instances, it peels off almost instantly where there is too much ink and too much sediment, and drops off into a yellow stain.

Q. You said in answer to the Court's question that frequently in books in the store you find fly leaves that absorb ink more quickly?

A. Yes, sir. In some of the cheap books it is just like blotting paper.

Q. You find that they have different kinds of paper in the flyleaves of books, do you not?

A. Yes, sir, it depends upon the quality of the book. Some of them are so cheap, just like blotting paper, and some of them are very fine. Each has the characteristics of printing paper. Your Honor, here is an interesting one. It shows oxidation. It was written in 1787.

It shows that the black is entirely off. The ink, with the exposure to the air, is off, showing the yellow stain.

WILLIAM R. DAVIS, recalled for the plaintiff in rebuttal, testified as follows:

Mr. BOLTON.—Q. State whether or not at any time you trimmed that exhibit "G"?

A. If you refer to the back part of it, yes; if you refer to the front part of it, no—so far as I know. On one occasion about—well, eight or ten months ago, that is, after the hearing or during the hearing in Judge Greene's court, that I spoke of yesterday, Mr. Smith produced this paper, Plaintiff's Exhibit "G," in my office, in the presence of Mr. Bolton and myself. At that time it has pasted on the back of it a receipt, or some blank form which you can see there now, and the edges of that piece pasted on the back, the receipt part, we call it, stuck over the edges of this brown paper about as I show you now (showing) about that much, only the ends were not as long as that—

The COURT.—Q. About an eighth of an inch?

A. Yes, sir, or a quarter of an inch, or something like that. These edges of the back piece were torn, split in several places, both at the top and at the bottom—as to the ends I cannot remember. It looked frayed to me. At any rate Mr. Smith having handed it to me, I took the scissors out of the drawer, and cut very carefully, so as not to cut the brown paper, and got the edge of this white thing down where it would be better taken care of. The thought of my mind was that this torn paper here might run into the brown paper, and tear that, too.

The COURT.—It was the better preservation of the paper?

A. Yes, sir. There were four or five breaks in the outer paper, which stuck out all around from this brown paper, both at the top and bottom and both ends. In trimming that I did it with great care, all that I could with ordinary eyesight, with a pair of long-bladed scissors. If there were fibers of this brown paper sticking on to the white part, the scissors might possibly have touched that, but not to cut into the body of the brown paper.

Mr. BOLTON.—Since you were on the witness stand, have you thought any further upon the subject of when this was first presented to you, when you first saw it?

A. Yes, sir; somewhat. I had a conversation with Mr. Galpin after we left the courtroom yesterday, and certain matters had crystallized in my mind to that extent, simply confirming my belief as I expressed it yesterday.

Mr. GALPIN.—Q. With regard to the citation matter over there in court, will you say now whether you saw that paper before or after that citation for the first time?

A. My memory does not go so far now, Mr. Galpin, as to say positively that I saw this paper before or at that time. But my mind is more strongly confirmed in the belief that that is the fact than it was before I thought of it. Of course, I had not thought of it specially until called here as a witness. But I do not say now, and I did not say yesterday, that I am positive, as an

affirmative act of memory, that I saw this brown paper at or before that hearing, but that is my belief.

Cross-Examination.

I trimmed the back paper on Plaintiff's Exhibit "G" so as not to interfere with the other paper to any extent. You will see now, if you look here, that the line of the white paper, the back piece, shown now right along under the edge of the brown. That is the black. The white paper appears to project a little beyond the buff. There may have been a place—of course, the human eye is not infallible, and I have not examined this with a microscope—where the fibers of the brown paper might have stuck out on the general line of the brown paper where the scissors may possibly have cut them. I would not say as to that but I know I cut with all the care a careful man has, so as not to cut it. I attempted to cut so as not to touch the brown paper with the scissors at all. At the time I cut it the brown paper was in exactly the same shape as it is there. The brown paper showed no frayed edges at that time, none perceptible to the ordinary eye. I can't remember that it showed any wearing or fraying at the edges.

Testimony closed.

The above is all of the testimony introduced on the trial of said action.

The case was thereupon, after argument, submitted to the Court for decision and in due time its findings of fact and conclusions of law as follows, to wit:

Findings of Fact and Conclusions of Law.

[Title of Court and Cause.]

This cause coming on regularly to be heard before the Court, sitting without a jury, a trial by jury having been expressly waived by plaintiff and defendant, Messrs. Galpin & Bolton appearing for plaintiff, Messrs. Gunnison, Booth & Bartnett appearing for defendant California Safe Deposit & Trust Company, and Messrs. Whitworth and Shurtleff and W. M. Cannon appearing as attorneys for the defendant C. K. King, oral and documentary evidence was introduced by said parties respectively, the cause was submitted to the court for decision, the Court now finds the following facts:

1. The plaintiff at the time of the commencement of said action was, and now is, a citizen of the State of Colorado, United States of America. The defendants then were and now are citizens of the State of California.

2. The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to possession of the property described in the complaint; and said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars ($47,500); the defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possesion of the plaintiff.

3. At all said dates the defendant, the California Safe Deposit and Trust Company, did not claim, nor does it now claim to have, nor does it have any interest in said

property except as bailee of plaintiff, but now withholds said property from the possession of plaintiff on the claim that it is property of defendant King, as administrator of the estate of J. W. Smith, deceased.

4. That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith deceased, has or ever had any interest in said property, and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff.

CONCLUSION OF LAW.

That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possession thereof.

Dated San Francisco, March 26th, 1901.

WM. W. MORROW,
Judge.

Thereafter, on the 26th day of March, 1901, said Court made and entered a judgment in favor of plaintiff and against defendants for the possession of the property described in the complaint.

The following exceptions were then and there duly taken by the defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, and the said defendant hereby tenders this its bill of exceptions to the Court, and the Court does hereby sign and seal the same.

Exception No. 1.

The defendant excepted to the finding of fact numbered 1, which reads as follows:

"The plaintiff at the time of the commencement of said action was, and now is, a citizen of the State of Colorado, United States of America. The defendants then were, and now are, citizens of the State of California."

Exception No. 2.

The defendant excepted to so much of finding of fact numbered 2 as reads as follows:

"The plaintiff, on the 26th day of September, 1900, was, ever since has been and still is the owner and entitled to the possession of the property described in the complaint."

Exception No. 3.

The defendant excepted to the finding of the Court that at the time of the commencement of the action, or on the 26th day of September, 1900, the plaintiff was the owner of the property described in the complaint.

Exception No. 4.

The said defendant excepted to the finding of the Court that on the 26th day of September, 1900, or at the time of the commencement of the action, the plaintiff was entitled to the possession of the property described in the complaint.

Exception No. 5.

The said defendant excepted to so much of finding of fact numbered 2 as reads as follows:

"Said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars ($47,500)."

Exception No. 6.

The said defendant excepted to so much of finding of fact numbered 2 as reads as follows:

"The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of plaintiff."

Exception No. 7.

The said defendant excepted to finding of fact numbered 3, which reads as follows:

"At all said dates the defendant, the California Safe Deposit and Trust Company, did not claim, nor does it now claim to have, nor does it have any interest in said property except as bailee of plaintiff, but now withholds said property from the possession of plaintiff on the claim that it is the property of defendant King, as administrator of the estate of J. W. Smith, deceased."

Exception No. 8.

The said defendant excepted to finding of fact numbered 4, which reads as follows:

"That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defend-

ant corporation entitled to longer hold possession thereof from plaintiff."

Exception No. 9.

The said defendant excepted to so much of finding of fact numbered 4 as states that the defendant King, as administrator of the estate of J. W. Smith, deceased, has not or ever had any interest in the property described in the complaint and that said defendant King, as such administrator was not entitled to the possession of said personal property or any part thereof.

Exception No. 10.

The said defendant excepted to so much of finding of fact numbered 4 as states that the estate of J. W. Smith, deceased, has not and never had any interest in the property described in the complaint and is not entitled to the possession of said personal property or any part thereof.

Exception No. 11.

The said defendant excepted to the finding of the Court that said corporation is not entitled to longer hold possession of said personal property from the plaintiff.

Exception No. 12.

The said defendant excepted to the conclusion of law which reads as follows:

"That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possession thereof."

Exception No. 13.

The said defendant excepted to the making, rendering, and giving the judgment given, made, and entered in this case, for the reason that the same is against law, and contrary to the evidence.

Exception No. 14.

The said defendant excepted to the giving and rendering judgment in favor of the plaintiff (defendant in error) and against the defendant (plaintiff in error).

Exception No. 15.

The said defendant excepted to the finding of the Court that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint the owner or entitled to the possession of the property described in the complaint or any part thereof.

And now, in furtherance of justice and that right may be done defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, presents the foregoing as his bill of exceptions in this case and prays that the same may be settled and allowed, and signed, sealed, and certified by the Judge, as provided by law.

WHITWORTH & SHURTLEFF and
W. M. CANNON,
Attorneys for Defendant C. K. King, as Administrator.

The foregoing bill of exceptions is correct, and is hereby allowed and settled.

WM. W. MORROW,

Circuit Judge of the United States Circuit Court, Ninth Circuit, Northern District of California.

[Endorsed]: Proposed bill of exceptions.

Received copy of the within proposed bill of exceptions admitted by copy this 25th day of April, 1901.

GALPIN & BOLTON,

Attorneys for Plaintiff.

Filed April 25th, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk. Bill of Exceptions (settled and allowed). Filed May 3, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT & TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.

Petition for Writ of Error.

C. K. King, as administrator of the estate of J. W. Smith, deceased, one of the defendants in the above-entitled action, feeling himself aggrieved by the decision and judgment of this Honorable Court entered in this cause on the twenty-sixth day of March, 1901, does through and by his attorneys, Messrs. Whitworth & Shurtleff and W. M. Cannon, respectfully, petition and pray this Court for the allowance of a writ of error from said decision and judgment to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order may be made fixing the amount of security and bond

which defendant should give and furnish upon said writ of error, and that upon the giving of said security and bond all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals in and for the Ninth Judicial Circuit, and prays that a transcript and record of the proceedings in the cause, duly authenticated, may be transmitted to said Circuit Court of Appeals.

Your petitioner and appellant herewith presents and files with the Clerk of this Honorable Court its assignment of errors.

WHITWORTH & SHURTLEFF,
W. M. CANNON,
Attorneys for Petitioner and Appellant.

It is ordered that the prayer of said petitioner be allowed and that said writ of error issue as prayed for.

WM. W. MORROW,
Judge.

[Endorsed]: Filed April 5, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit
Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT & TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.
No. 12,983.

Assignment of Errors.

Now comes C. K. King, administrator of the estate of J. W. Smith, deceased, one of the defendants in the above-entitled action, by his attorneys, Messrs. Whitworth & Shurtleff, and W. M. Cannon, and upon the records and proceedings in this case, assigns the following errors, to wit:

1. That the Court erred in making the finding of fact numbered 1, which reads as follows:

"The plaintiff at the time of the commencement of said action was, and now is, a citizen of the State of Colorado, United States of America. That defendants then were, and now are, citizens of the State of California."

2. That the Court erred in finding so much of the finding of fact numbered 2 as reads as follows:

"The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to the possession of the property described in the complaint."

3. That the Court erred in finding that at the time of the commencement of the action, or on the 26th day of September, 1900, the plaintiff was the owner of the property described in the complaint.

4. That the Court erred in finding that on the 26th day of September, 1900, or at the time of the commencement of the action, the plaintiff was entitled to the possession of the property described in the complaint.

5. That the Court erred in finding so much of finding of fact numbered 2 as reads as follows:

"Said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars ($47,500)."

6. That the Court erred in finding so much of finding of fact numbered 2 as reads as follows:

"The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of plaintiff."

7. The Court erred in making the finding of fact numbered 3, which reads as follows:

"At all said dates the defendant, the California Safe Deposit and Trust Company did not claim, nor does it now claim to have, nor does it have, any interest in said

property except as bailee of paintiff, but now withholds said property from the possession of plaintiff on the claim that it is the property of defendant King, as administrator of the estate of J. W. Smith, deceased."

8. The Court erred in making finding of fact numbered 4, which reads as follows:

"That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff."

9. The Court erred in so much of finding numbered 4 as states that the defendant King, as administrator of the estate of J. W. Smith, deceased, has not, or ever had, any interest in the property described in the complaint, and that said defendant King, as such administrator, was not entitled to the possession of said personal property or any part thereof.

10. The Court erred in so much of finding numbered 4 as states that the estate of J. W. Smith, deceased, has not, and never had any interest in the property described in the complaint, and is not entitled to the possession of said personal property or any part thereof.

11. The Court erred in its finding that said corporation is not entitled to longer hold possession of said personal property from the plaintiff.

12. The Court erred in its conclusion of law which reads as follows:

"That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possesion thereof."

13. That the Court erred in making, rendering, and giving the judgment given, made, and entered in this case, for the reason that the same is against law, and contrary to the evidence.

14. That the Court erred in giving and rendering judgment in favor of the plaintiff (defendant in error) and against the defendant King (plaintiff in error).

15. That the Court erred in finding that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint, the owner, or entitled to the possession of the property decribed in the complaint or any part thereof.

WHITWORTH & SHURTLEFF,
W. M. CANNON,
Attorneys for Defendant C. K. King.

[Endorsed]: Filed April 5, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT & TRUST COMPANY (a Corporation), and C. K. KING, the Administrator of the Estate of J. W. SMITH, Deceased,

Defendants.

Order Allowing Writ of Error and Staying Proceedings.

The defendant, C. K. King, as admisistrator of the estate of J. W. Smith, deceased, having this day filed his petition for a writ or error from the decision and judgment of this Court entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this Court be suspended and stayed until the determination of said

writ or error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been allowed.

Now, therefore, it is ordered that upon the said defendant, C. K. King, as administrator of the estate of J. W. Smith, deceased, filing with the clerk of this Court within five days of the date hereof a good and sufficient bond in the sum of fifty thousand dollars, said bond to be approved by the Court, that all further proceedings in this Court be, and they are hereby, suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

All proceedings stayed for five days from the date hereof.

Dated April 5th, 1901.

WM. W. MORROW,

Judge.

[Endorsed]: Filed April 5, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CHARLES H. SMITH,
Plaintiff,
vs.
THE CALIFORNIA SAFE DEPOSIT AND TRUST CO. (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,
Defendants.
No. 12,983.

[50c. I. R. Stamp. Canceled Apr. 10, 1901. U. S. F. & G. Co.]

[50c. I. R. Stamp. Canceled Apr. 10, 1901. U. S. F. & G. Co.]

Supersedeas Bond on Writ of Error.

Know all men by these presents, that C. K. King, as administrator of the estate of J. W. Smith, deceased (defendant above named), as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, and having the power to execute and guarantee bonds and undertakings in judicial proceedings and empowered to transact business in the State of California, as surety, are held and firmly bound unto Charles H. Smith (the above-named plaintiff) in the full sum of fifty thousand ($50,000.00) dollars,

to be paid to said Charles H. Smith, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made said C. K. King binds himself, his heirs, executors, and administrators, and said surety binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of April, 1901.

Whereas, lately in the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California, in a suit pending in said court between Charles H. Smith, plaintiff, and C. K. King, as administrator of the estate of J. W. Smith, deceased, and the California Safe Deposit and Trust Company a corporation, defendants, judgment was rendered and entered on the 26th day of March, 1901, against the said defendants, and in favor of said plaintiff, and the said defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, having obtained from the said Court its writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the above-named plaintiff, and to the defendant, the California Safe Deposit and Trust Company, a corporation, citing and admonishing them, and each of them, to appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said C. K. King, as administrator of the estate of J. W. Smith, deceased (plaintiff in error), shall prosecute the said writ to effect and answer all damages

and costs, if he fails to make good his plea, then the above obligation to be void; else to remain in full force and effect.

In witness whereof, the said C. K. King hath hereunto set his hand and seal, and the said the United States Fidelity and Guaranty Company has caused its corporate seal to be hereunto affixed and its corporate name to be hereunto signed, and these presents to be executed by its proper officers thereunto duly authorized, this 10th day of April, 1901.

C. K. KING.

Corporate Seal of U. S. Fidelity & Guaranty Co.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

By its Attorney in Fact,
JOHN H. ROBERTSON.

State of California,
City and County of San Francisco. } ss.

On this 10th day of April, A. D. one thousand nine hundred and one (1901), before me, James L. King, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared John H. Robertson, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company, a corporation, and the said John H. Robertson acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year first above written.

[Notarial Seal] JAMES L. KING,

Notary Public in and for the City and County of San Francisco, State of California.

Approved.

WM. W. MORROW,

Judge.

[Endorsed]: Filed April 10, 1901. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a Corporation), and C. K. KING, as Administrator of the Estate of J. W. SMITH, Deceased,

Defendants.

No. 12,983.

Clerk's Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby

certify the foregoing one hundred and seventy-five (175) written pages, numbered from 1 to 175, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $102.95, and that said amount was paid by C. K. King, as administrator of the estate of J. W. Smith, deceased, one of the defendants above named.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 8th day of May, A. D. 1901.

[Seal] SOUTHARD HOFFMAN,

Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Ten Cent U. S. Int. Rev. Stamp. Canceled.]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between C. K. King, as administrator of the estate of J. W. Smith, de-

ceased, plaintiff in error, and Charles H. Smith, and the California Safe Deposit and Trust Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said C. K. King, as administrator of the estate of J. W. Smith, deceased, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the ninth day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the tenth day of April, in the year of our Lord one thousand nine hundred and one (1901).

[Seal] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by:

WM. W. MORROW,
Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this tenth day of April, 1901.

GALPIN & BOLTON,

Attorneys for Charles H. Smith, Defendant in Error.

GUNNISON, BOOTH & BARTNETT,

Attorneys for California Safe Deposit & Trust Co., Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,

Clerk.

[Endorsed]: No. 12,983. Circuit Court of the United States, Ninth Circuit, Northern District of California. C. K. King, as Administrator, etc., Plaintiff in Error, vs. Charles H. Smith, California Safe Deposit and Trust Co., a corporation, Defendants in Error. Writ of Error. Filed April 10, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Charles H. Smith and the California Safe Deposit and Trust Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the ninth day of May next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 12,983, wherein C. K. King, as administrator of the estate of J. W. Smith, deceased, is plaintiff in error, and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this tenth day of April, A. D. 1901.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this tenth day of April, 1901.

GALPIN & BOLTON,
Attorneys for Charles H. Smith, Defendant in Error.

GUNNISON, BOOTH & BARTNETT,
Attorneys for California Safe Deposit and Trust Co., Defendant in Error.

[Endorsed]: No. 12,983. Circuit Court of the United States, Ninth Circuit, Northern District of California. C. K. King, as Admr. etc., vs. California Safe Deposit and Trust Co. (a corporation) and Charles H. Smith. Citation. Filed April 10, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 700. In the United States Circuit Court of Appeals for the Ninth Circuit. C. K. King, as Administrator of the Estate of J. W. Smith, Deceased, Plaintiff in Error, vs. Charles H. Smith and the California Safe Deposit and Trust Company (a Corporation), Defendants in Error. Transcript of Record. In error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed May 9, 1901.

F. D. MONCKTON,
Clerk.

No. 700

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

C. K. KING, as Administrator of the Estate of J. W. Smith, deceased,
Plaintiff in Error,

vs.

CHARLES H. SMITH and THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY, a corporation,
Defendants in Error.

POINTS AND AUTHORITIES

for Charles H. Smith, Defendant in Error, on Motion to Dismiss and Motion to Affirm,

GALPIN & BOLTON,
Attorneys for Defendants in Error.

L. S. B. SAWYER,
Of Counsel.

Pernau Bros. Print, 543 Clay St., S. F.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

C. K. KING, as administrator of the estate of J. W. Smith, deceased, Plaintiff in Error, v. CHARLES H. SMITH and the CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY, a corporation, Defendants in Error.	No. 700.

POINTS AND AUTHORITIES

for Charles H. Smith, defendant in error, on motion to dismiss and motion to affirm.

Practice of uniting motions.

The practice of uniting with a motion to dismiss a motion to affirm on the ground that although the record may show jurisdiction, it is manifest the writ was taken for delay only, is authorized by the Supreme

Court of the United States, Rule VI, Paragraph V and adopted by Rule VIII of this Court as follows:

> "The practice shall be the same as in the Supreme Court of the United States as far as the same shall be applicable."

Foster recognizes this practice in the Supreme Court and digests the authorities upon it.

2 Foster, Sec. 489 p. 1067;

Where it appears *even before the hearing* that the writ of error or appeal is clearly frivolous, motion to affirm will be granted.

Chanute City v. *Trader*, 132 U. S. 210;
Sugg v. *Thornton*, 132 U. S. 524.

The case of *Chanute City* v. *Trader*, *supra*, reviews and renders it unnecessary to examine previous cases.

In this case the Court says:

> "In the present case there does not appear to be any ground for contending that this Court has no jurisdiction, yet we are entirely satisfied that the reasons assigned for taking the writ of error are entirely frivolous and that it was taken for delay only", and the motion to affirm was granted.

In the *Tryon case* 105 U. S. 267, the Court says:

> "The motion to dismiss must therefore be overruled, but on looking into the record, we are satisfied the appeal was taken for delay." Motion to affirm granted.

In *Swope* v. *Leffingwell*, 105 U. S. 3:

> "We have jurisdiction of this case. The motion to dismiss is therefore denied, but * * * the motion to affirm is granted."

In *Hinckley* v. *Morton*, 103 U. S. 764:

> "Our jurisdiction of this case is clear. The motion to dismiss is therefore denied, but we think the motion to affirm should be granted."

In *Micas* v. *Williams*, 104 U. S. 556:

> "There was, on the record, *as it stood when* these motions were made, at least sufficient color of right to a dismissal, to justify us in entertaining with it a motion to affirm in accordance with the provisions of Rule VI, par. V. Motion to affirm granted."

In *The Alaska*, 103 U. S. 201:

> "There is sufficient color on the motion to dismiss to warrant us in entertaining the motion to affirm. Judgment affirmed."

In *Evans* v. *Brown*, 109 U. S. 180, motion to dismiss denied:

> "But on looking into the record we find the case was manifestly brought here for delay only. All the questions presented are so frivolous as not to need further argument."

A motion to dismiss a writ of error on appeal may be made at any time *even before the term* to which the return should be made.

2 Foster, Sec. 489, p. 1067;
Ex parte Russell, 13 Wall. 664;
Clarke v. *Hancock*, 94 U. S. 493;
Thomas v. *Wooldridge*, 23 Wall. 283.

In *Clark* v. *Hancock*, *supra*, the Court says:

> "It is insisted that a motion to dismiss cannot be entertained until the return day of the writ. Such was the old practice, but in *ex parte Russell*,

13 Wall. 671, and *Thomas* v. *Wooldridge*, 23 *id.* 288, the rule was changed. It seemed to us then that such a change would be likely to prevent great delays and expense and further the ends of justice. Subsequent experience confirms that opinion. In the present crowded state of our docket it becomes us to be especially careful that our jurisdiction is not invoked *for delay merely*, and when the record is presented in such a form that we can, without too great inconvenience, inform ourselves of the question to be decided, we shall be inclined to receive applications of this kind. In the present case we have a printed record and it is evident that we have no jurisdiction." Motion granted.

The syllabus of *Thomas* v. *Wooldridge*, *supra*, reads:

> " If the record be printed and the rules of the court about motions of that sort be complied with by the party making the motion, the motion will be entertained and granted."

Motion to Affirm.

We insist that the appeal was taken solely for delay and to prevent a speedy sale of the railroad and a reorganization which could not be effected while the ownership of the bonds was in doubt, for the ownership of the bonds is the ownership of the railroad.

I.

The point made by appellant cannot be investigated:

I. The question involved is a matter of fact, which this Court has no power to review.

II. Any matter of law considered in reaching the fact found cannot be reviewed; where the finding states a mixed question of law and fact, the record should show a separate statement of the matter of law and exception thereto.

III. No matter of law is so excepted to as to be reviewable upon this record, save that the findings do not support the judgment.

IV. If this Court had jurisdiction to review the facts and had a record before it properly presenting the alleged error of law the judgment would be affirmed.

As to the power of this Court to review the errors assigned, upon the fact of ownership of bonds.

"Ownership" is an ultimate fact, dependent upon various probative facts. They in turn are dependent upon the evidence. "Ownership" in the present case of C. H. Smith depends upon the existence or non-existence of a gift—and appellant's argument is—see his brief, 17–18:

" 1. Aside from the confidential relation, the evi-
" dence is insufficient to establish an oral gift.

" 2. The existence of a confidential relation and the
" suspicious facts appearing in the record raise a pre-
" sumption of the illegality of the gift which the evi-
" dence is not sufficiently clear and strong to over-
" come."

Counsel then proceeds through the remainder of the

brief to argue that the evidence is not sufficient to sustain the finding of fact as to *ownership* because the evidence does not establish a legal gift.

In other words, he is making to the Circuit Court of Appeals the argument properly addressable to a jury on the question whether Charles H. Smith or the estate of J. W. Smith was the true owner of these bonds.

This argument is not presentable here because it is an argument upon the sufficiency of the evidence to establish a fact. Hereafter we will examine this evidence, but our first proposition is that the matters excepted to and argued are matters of fact and not reviewable here. The only point presentable is, do the *facts* as found—not in the opinion—but *in the findings* warrant the conclusion of law, and the judgment. This point is debatable, but is not debated by appellant for the reason, that if the findings of fact are correct the conclusion of law and the judgment irresistibly follow.

That this Court cannot review the fact of ownership is apparent. The 7th amendment to the Constitution of the United States provides:

"No fact tried by a jury" (and the finding of a Court "shall have the same effect as the verdict of a jury", R. S. §649) shall be otherwise re-examined in any court of the United States than according to the rules of the common law, "that is, according to the Supreme "Court, by a new trial in the court below or by the "award of a *venire de novo* by an appellate court for

" some *error of law* which intervened in the proceed-
" ings". *Miller* v. *Ins. Co.*, 12 Wall. 285, 300, 301.

The Act of Congress provides that there shall be no reversal in a United States appellate court, upon a writ of error, "for any error in fact", R. S. §1011. The Constitution and the Acts of Congress, viz.: the 7th amendment and R. S. §§649, 700 and 1011, cover the ground and govern this case. In the clause of §700 R. S. which reads: "And when the finding is special the " review *may extend* to the determination of the suffi-
" ciency of the facts found to support the judgment", the words "may extend to" are construed to mean "*must extend no further*".

Jennison v. *Leonard*, 21 Wall. 302, 307.

A bill of exceptions cannot be used as is done in this case, to bring up the whole testimony for review.

Simmons v. *Wagner*, 101 U. S. 260, 261;
Dirst v. *Monio*, 14 Wall. 484, 490;
Coddington v. *Richardson*, 10 Wall. 516, 518;
Hausskuscht v. *Claypool*, 1 Blk. 435;
Johnston v. *Jones*, 1 Blk. 220.

The appellate court cannot review the findings of fact by the court. They are as conclusive as the verdict of a jury. *Walnut* v. *Wade*, 103 U. S. 683, 688; *Craig* v. *Mo.*, 4 Pet. 410, 427; *Ins. Co.* v. *Sea*, 21 Wall. 158.

It is irregular and improper to embody all the evidence in the bill of exceptions where no part of it has been excepted to. *Pennock* v. *Dialogue*, 2 Pet. 15:

> "We have often held that the Act of 1865 (R. S. §§649, 700) does not permit us to consider the effect of evidence in the case, but only to determine whether the facts found at the trial below are sufficient to support the judgment. * * * Among the objections included in the general exception are many relating to the *sufficiency of the evidence to support the findings*. These cannot be examined here, etc."
>
> *Boogher* v. *Ins. Co.*, 103 U. S. 90-98.

A finding upon a conclusion of law pure and simple is not conclusive (*French* v. *Edwards*, 21 Wall. 151, a case in which the conclusion of law did not follow from the premises of facts found). But

Findings of mixed law and fact cannot be disturbed.

> "In ordering judgment for the plaintiff, certain propositions of law are announced by the Judge as having been held by him. These are important only as they affect the question whether the facts found are sufficient to support the judgment. * * No specific exception is or can be taken to them."
>
> *Jennison* v. *Leonard*, 21 Wall. 302, 307, *supra*.

> "It" (a certain finding) "is not open here to inquiry. And as it seems, from its very nature, to be *a mixed question of law and fact* which would be concluded by the verdict of a jury, it must be equally conclusive here."
>
> *Bridge Co.* v. *Kan. Pac. Ry. Co.*, 92 U.S. 315, 318.

> "Questions of fact will not be re-examined by this Court in common law actions * * as it belongs to the Circuit Court to find the facts, and, in order to do that, *it must weigh the evidence and draw the inferences of fact from the whole evidence given in the case*."
>
> *Crews* v. *Brewer*, 19 Wall. 70, 72.

> "The appellate court has no authority upon a writ of error to revise the evidence given in the court below to ascertain whether the judge who tried the case without the intervention of a jury rightly interpreted the evidence or drew correct conclusions from it. This is the province of the judge, etc."
>
> *Hyde* v. *Booraem*, 16 Pet. 169, 176.

Where the Circuit Court decides *both the law and the questions of fact*, no exceptions can regularly be taken.

U. S. v. *King*, 7 How. 833, 853;
Cooper v. *Omohundro*, 19 Wall. 65, 70;
Bond v. *Brown*, 12 How. 254;
Flanders v. *Tweed*, 9 Wall. 425;
The Abbotsford (Ad'y), 98 U. S. 440.

> "Neither party is entitled to a bill of exceptions as to any special finding of the court, for the plain reason that the special finding of the Circuit Court in such a case is not a proper subject of exception nor of review in the Supreme Court."
>
> *Tyng* v. *Grinnell*, 92 U. S. 467, 471.

If there is a special finding the evidence will not be examined to see whether the finding is right.

Sault v. *Shepherd*, 4 Wall. 502, 507;
Copelin v. *Ins. Co.*, 9 Wall. 461, 467;
Ins. Co. v. *Folsom*, 18 Wall. 237, 253;
U. S. v. *Dawson*, 101 U. S. 569;
Cucullu v. *Emmerling*, 22 How. 83.

> "Only exceptions taken at the trial to the ruling of the law by the judge and to the admission or rejection of evidence can be inspected. Beyond this the appellate court has no power to look into a bill on a writ of error, as it is a creature of the

statute restricted to the points stated."

Zeller v. *Eckert*, 4 How. 297;
Phillips v. *Preston*, 5 How. 489.

"A bill of exceptions should only present the rulings of the court upon some matter of law, as upon the admission or exclusion of evidence, and should contain only so much of the testimony as may be necessary to explain the bearing of the rulings on the issues involved."

Lincoln v. *Claflin*, 7 Wall. 136.

In this bill of exceptions there are no exceptions to any rulings of the Court in the progress of the trial, to the admission or exclusion of evidence. The exceptions are only to the Court's findings of fact and conclusions of law and to the judgment.

Record, pp. 176–179;
Assignments of Error, p. 183.

That appellate courts are only concerned with matters of law is illustrated in Rule 10 of this Court. Matters of fact have nothing to do with a case in an appellate court.

In a recent case *of trespass* to try title which resolved itself at last into a question of surveys and boundaries, says the Circuit Court of Appeals of the Fifth Circuit:

"If there was anything in the evidence with regard to lines or fences" (in this case it would be in regard to gift or delivery) "or other matters which tended to render the verdict vague and uncertain" (the findings untrue or insufficient), "*it is a matter wholly beyond our inquiry and* could only have

been dealt with by the trial court on a motion for a new trial."

Cochran v. *Schreiber*, 107 Fed. 371, 375.

And this notwithstanding that the decision of a motion for a new trial is not reviewable in United States Courts.

What should plaintiff in error have done to obtain a review of the questions which he now seeks to have reviewed? The Supreme Court answers this question. In a case where a trial by jury has been dispensed with and the court tries both the law and the facts, to enable the appellate court to re-examine the point or points of law involved, the counsel, after the close of the evidence, should present the propositions of law (e. g. in case at bar what constitutes a valid gift), which it is claimed should govern the decision, and the Court should state the rulings thereon, or in coming to its determination, and so much evidence and no more should be incorporated in the bill of exceptions as was deemed necessary to present the points of law determined against the party bringing the writ.

Arthurs v. *Hart*, 17 How. 15;
Norris v. *Jackson*, 9 Wall. 125, 128;

and other cases.

Under the law announced by this Court, at the argument—that it could not review findings that were supported by any evidence, or that depended upon conflicting evidence—are we not clearly entitled to an affirm-

ance of the judgment of the Court below?

Not only does the special finding herein support the judgment, but the evidence, if it can be looked into, abundantly supports the finding. We thought to have saved the Court the examination of the evidence, but we are better satisfied and feel safer about our case as it is.

In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, *shall be awarded* upon the amount of the judgment.

2nd par. Rule 23 *Supreme Court*;
2nd par. Rule 30 *Circuit Court of Appeals Ninth Circuit.*

What says the Act of Congress?

> "Where, upon a writ of error, judgment is affirmed * * the court shall adjudge to the respondent in error just damages for his delay, and single or double costs at its discretion" R. S. §1010.

The authorities under this law and this rule are numerous, and all our way.

Barrow v. *Hill*, 13 How. 54;
Kilbourne v. *St. Sav. Inst.*, 22 How. 503;
Sutton v. *Bancroft*, 23 How. 320;
Jenkins v. *Banning*, *id.*, 455;
Prentice v. *Peckersgill*, 6 Wall. 511;
Campbell v. *Wilcox*, 10 Wall. 421;
Ins. Co. v. *Huchbergers*, 12 Wall. 164;

Hermessy v. *Sheldon*, *id.*, 440;
Pennywit v. *Eaton*, 15 Wall. 380, 382;
Hall v. *Jordan*, 19 Wall. 271;
R. R. Co. v. *Foley*, 94 U. S. 100;
Peyton v. *Heinckin*, 131 U. S. C. 1;
Sire v. *Brake Co.*, 137 U. S. 579 (on motion to dismiss and affirm);
Mining Co. v. *Starr*, 141 U. S. 222;
Micas v. *Williams*, 104 U. S. 556.

In *Amory* v. *Amory*, 91 U. S. 356 and *Whitney* v. *Cook*, 99 U. S. 607, the Court says that it will by the assessment of damages suppress the evil of resorting to its jurisdiction upon frivolous grounds, or "where it " finds that its jurisdiction has been invoked merely to " gain time".

Even if the evidence could be examined and the facts reviewed, the opinion of the Court below clearly shows the weakness of appellants' contention, and that there could have been no purpose in this proceeding but delay.

II.

On the merits.

The only point of appellant is, that no gift of the bonds was made by J. W. Smith to Charles H. Smith.

Long prior to this gift they had been placed in escrow by the deceased father of Charles H. Smith with Abner Doble, under an agreement with F. M. Smith,

whereby Doble was to deliver them to him upon payment of a certain amount of money. This option expired October 25th, 1895. Before that time no manual delivery was possible. The gift was made August 15th, 1895, delivery November 14th, 1895. J. W. Smith died November 15th, 1895. The Court in its opinion makes a very concise statement of the facts as established by the evidence as follows:

"There is no substantial conflict in the testimony in "the case. The only question is as to WHETHER IT "ESTABLISHES THE FACT that prior to his death J. W. "Smith gave the bonds in question to his son Charles "H. Smith, the plaintiff."

"The witness Abner Doble, referring to the receipt "for the bond dated San Francisco, November 14, "1895, executed by Charles H. Smith and signed 'J. "W. Smith by C. H. Smith', when asked 'How did "'you happen to deliver these bonds to Mr. Smith "'(referring to Charles H. Smith) upon *this receipt*' "replied 'I cannot remember distinctly, only I think, "'my impression is, that Captain J. W. Smith had "'told me that the bonds belonged to Charley Smith, "'and to give them to him'. In answer to the ques-"tion 'How long before this occurrence had you seen "J. W. Smith?' the witness replied: 'It had only been "'a short time. I was over there to see him a short "'time before he died'. Again, referring to a conver-"sation between the witness and J. W. Smith, the "witness said: 'My impression is he told me that the

" 'bonds belonged to Charley, and to deliver them to
" 'him. I think that is why I did so. I think that
" 'conversation was the groundwork of my delivering
" 'the bonds to his son'. The witness being asked if
" he remembered ever having received a written order
" from J. W. Smith, answered: 'I don't remember ever
" 'getting any direct order from him. I delivered
" 'them on account of what he told me, that they be-
" 'longed to his son; and when his son came for them,
" 'I delivered them'."

" This evidence, it seems to me, establishes the fact
" that Doble delivered the bonds to the plaintiff Charles
" H. Smith as his property, pursuant to the conversa-
" tion of the witness J. W. Smith. But aside from
" this declaration, there is other testimony to the effect
" that J. W. Smith had given these bonds to his son
" Charles H. Smith."

" The witness W. R. Thomas was the notary public
" who took the acknowledgments of J. W. Smith on the
" 14th of August, 1895, to certain deeds making con-
" veyances to the children of the grantor. He was
" asked to state whether or not at any time when he
" visited J. W. Smith the latter made any statement
" about the disposition of his property. The witness
" answered that J. W. Smith said that he had deeded
" away all of his property, so that in the event of his
" dying, there would be no trouble about his estate.
" The witness stated that prior to taking the acknow-
" ledgments to the deeds on August 14, 1895, Mr.

" Smith told him he was going to deed away all his " property before his death, and said to him, 'I want " 'you to make out a lot of deeds for me. I am going " 'to convey my property that way rather than make a " 'will, because there is always chance for litigation on " 'a will'. The witness says he seemed to be afraid " that there would be litigation if he made a will, and " proposed to distribute all his property before his " death."

" The witness C. K. King, administrator of the " estate, and one of the defendants in this action, testi- " fied that he heard J. W. Smith talk about the disposi- " tion of his property. He mentions one of these con- " versations as having occurred in the summer of 1895, " perhaps a month or two before J. W. Smith died, and " that he had told the witness that he had given the " property away to his children. The witness did not " know whether he said he had given all of it away, " but knew that he said most of it, and thought he said " that he had given his son C. H. Smith the railroad " property; that he stated that he had given the railroad " bonds to his son, and that this statement was made " about two months before he died."

" The witness G. W. Palmantier, an Oakland banker, " was acquainted with J. W. Smith in his lifetime. " Smith was a customer of the bank of which the wit- " ness was manager. Palmantier testified that he had " had conversations with J. W. Smith, in which the " disposition of his property was referred to. The wit-

" ness stated that he had called on Smith almost every
" day while he was sick, and they talked a great deal
" about the disposition of the property; that J. W. Smith
" told the witness that he did not own anything in the
" world; that he had disposed of everything; that he had
" turned over everything; that he had made deeds of
" his property to his daughters, and had turned over
" the bonds of the California & Nevada Railroad Com-
" pany to Charles H. Smith, his son. This witness
" appears to have had intimate relations with the de-
" ceased, and to have been familiar with his affairs.
" The deceased appears to have told the witness several
" times that he had disposed of his property. One of
" these conversations at least appears to have been after
" the execution of the deeds in August, 1895."

" From all the foregoing testimony it appears that
" it was the purpose of J. W. Smith to distribute his
" estate and give these bonds to the plaintiff, and that
" be stated before his death that he had made such dis-
" tribution. This testimony, coupled with the plain-
" tiff's possession of the bonds prior to his father's
" death, indicates very clearly that prior to the death of
" J. W. Smith the latter transferred the title and pos-
" session of the bonds to his son Charles H. Smith, the
" plaintiff in this case."

" The evidence on the other hand tending to show
" that these bonds really belonged to the estate of J. W.
" Smith, is found in the acts of ownership exercised by
" J. W. Smith during his lifetime, and in the character

" of the receipt executed by C. H. Smith on November " 14th, 1895, when he withdrew the bonds from deposit " with Abner Doble, and the further fact that C. H. " Smith did not present to Doble the formal assignment " of the bonds executed by his father on August 14, " 1895, as the evidence of his right to their possession. " the receipt executed by C. H. Smith shows that he " was receiving the bonds of his father, J. W. Smith. " But this circumstance is not conclusive. As the " bonds were deposited by J. W. Smith, it was proper " that Doble should require, as he did, that the receipt " should be executed in the name of J. W. Smith."

* * * "It appears further that the relations be- " tween the father and son were cordial and to some " extent at least confidential. It was the son who, un- " der the direction of his father, drew up the deeds exe- " cuted on August 14, 1895, conveying property to the " other children; and there does not appear to have been " any reason why the father at that time should not " have distributed to the son such share of the estate as " he wished the son to receive; indeed, there would be " cause for surprise, if, under the circumstances, this " had not been done."

According to theory of plaintiff in error, the bonds alone, of all Smith's estate, were not given away.

This Court is not sitting as a jury.

The brief of plaintiffs in error is an argument to this Court sitting as a jury. This is illustrated as follows:

On page 8 he takes up the testimony of Abner Doble, a witness produced by the plaintiff in error, and argues that the testimony of this witness cannot be relied upon and that the Court erred in considering his testimony and thus in effect concedes that if the testimony is true the decision is correct. Again on page 9 he takes up the testimony of Mr. Palmantier, and argues as he might to a jury, why it cannot be relied upon by the Court. Again, on page 11 he treats the testimony of Mr. Thomas in the same manner. We find the plaintiff in error arguing to this Court that the Court cannot consider and rely upon the testimony of his own witnesses. The argument reaches its height on page 19 where plaintiff in error says: "The testimony " of Thomas, King, Palmantier and Doble was taken " between five and six years after J. W. Smith's death, " and doubtless neither of these gentlemen then had " cause to believe that they would be called upon to " state those conversations after the lapse of that time. " They do not attempt to state the exact language. In " the nature of things they could not. Mr Palmantier " states that J. W. Smith said that 'he calculated' that " his son 'would have' the bonds, or the railroad; again, " that he calculated that his son 'had' the bonds, 'or " 'that they were his, or they belonged to Charlie, or " 'that he had given them to him already'. Again, " that he had 'turned the bonds over', that 'he had " 'given them to him'. Again, 'I have given and " 'turned over my bonds to C. H. Smith' (trans. pp.

" 77–78). These statements are not only insufficient but " irreconcilable, and serve only to show how treacher- " ous is the human memory."

The plaintiff in error again referring to HIS OWN testimony says (brief 20):

" The rest of King's testimony is not definite and " certain, for while his deposition taken a few days be- " fore the trial he said the statement was that J. W. " Smith had given his son the 'railroad' on the trial he " changed the word to 'bonds'."

On page 20 counsel, again referring to the testimony of Doble, says: "It must be placed in the category of " slight evidence if worthy of notice at all". Speaking of all the evidence of these witnesses, counsel says: " This WEAK and UNSATISFACTORY evidence is rebutted " by the very nature of the transaction between C. H. " Smith and Doble". Without going farther into the evidence in this case it becomes perfectly apparent from the brief of plaintiff in error that he is asking this Court *to sit as a jury* and determine the *weight* of evidence. His argument admits that there was evidence to sustain the decision of the Court, but that such evidence should be disregarded.

The jury phase of this argument is again illustrated by the fact that plaintiff in error devotes pages of his brief to attacking the written assignment made by J. W. Smith to his son Charles Smith. Plaintiff in error gives much attention to the confidential relation

existing between the parties, and argues that the proof of gift must be stronger where a confidential relation exists than otherwise. In this argument counsel admits that there was some proof of a gift but by reason of the confidential relation it was not sufficient. This was a matter wholly for the lower Court to consider, and that the lower Court did consider it is apparent from the opinion, where the Court said:

" Returning now to the testimony of the witnesses " Doble, King, Palmantier and Thomas: This tes- " timony is clear and positive that J. W. Smith in- " tended to distribute his property to his children, and " did so as to the real estate; that he intended to give " the railroad bonds to his son, and the testimony is " reasonably certain that he did so. These witnesses " are all gentlemen of character, and their testimony " has not been impeached or discredited in any way. " This evidence cannot be rejected; and, giving it the " consideration it is entitled to receive, the Court " arrives at the conclusion that the plaintiff has, under " the law relating to gifts of property, established his " ownership of the bonds and his right to recover pos- " session thereof."

If we were to argue this matter to this Court sitting as a jury we would call your attention to the testimony of Charles Smith, on page 129 of the transcript, where he says: "He was particularly desirous of avoiding " litigation and having everything fixed before he " passed away and in connection with the bonds, I

" spoke to him about this bill of sale, and he said,
" ' Charlie, I'll fix a better way than that', or something
" ' or other, I don't know just what; 'I will tell Mr. Pal-
" ' mantier, Mr. King and Mr. Doble what disposition I
" ' have made of these bonds, and I will direct Mr. Doble
" to give you these bonds. I want you to go over and
" have Mr. Doble come here to my room so that I can
" tell him that I have given you these bonds". On page 130 the plaintiff testified that "Mr. Doble came in
" response to the request of his father, that he left them
" alone together and went for a walk, that his father
" told him afterwards 'I have GIVEN MR. DOBLE an
" 'ORDER TO DELIVER YOU these bonds, and told him
" 'that they belonged to you. That I had given them
" 'to you'."

We would call the Court's attention to the fact that the statements made to Mr. Palmantier, to Mr. King, to Mr. Thomas and to Mr. Doble were made in the absence of Charles H. Smith and some of them during his absence in Denver, and when Mr. J. W. Smith could not have been under influence of his son. We would farther call your attention to the testimony of Mr. Doble on pages 67–68 and 69 of the transcript. The testimony of Mr. Palmantier on page 72 and page 77 and the testimony of Mr. Thomas, pages 80 and 81, and page 117 where THE PLAINTIFF IN ERROR testified positively that Mr. Smith, deceased "had stated to him
" that he had given the bonds to his son", and if we were arguing this to a jury we would answer the argu-

ment of plaintiff in error relative to the mental condition of the deceased by showing that Mr. Thomas testified on page 80, after speaking of his long acquaintance with deceased, "He was in my opinion sane". Page 84, "I think I saw him last the day before his " death, and also probably a day or two before that. " My recollection is that I was there about every other " day". And the testimony of the PLAINTIFF IN ERROR was, "The last time I had any conversation with him " he talked with me rationally, the same as he always " did. He never at any time before his death talked " to me in an irrational manner. For three or four " days before his death he did not seem to want to talk " to anyone, and I did not bother him. He was of " sound mind. I could not see *that he was of unsound* " *mind at all.*"

From all the testimony there can be no doubt that the deceased told Mr. Doble that he had given the bonds to his son and ordered and directed him to deliver them. This verbal order ACTED ON IN THE LIFETIME OF DECEDENT was as good as a written one. There can be no doubt that Mr. Smith died in the belief that he had given the bonds to Charles H. Smith.

As to the cases cited by plaintiff in error none of them are applicable because the intent of testator manifested in August, 1875, was carried into effect by an actual and symbolic delivery during lifetime of decedent.

We submit that no stronger proof than the argument and brief of the plaintiff in error can be presented to show that the writ of error is not taken out in good faith. The whole brief is but an appeal to this Court to do what every lawyer knows it cannot do—sit as a jury—and review the evidence. We insist that this appeal is frivolous, and that the judgment should be dismissed with damages as required by the Act of Congress. Counsel also must have known that the record did not present any question of law he desired to argue, for the conclusion of law and the judgment irresistibly follow from the facts found.

If Charles Smith was the owner of the bonds deposited with the Safe Deposit Company as his bailee, and by reason of the interference and claim of King, administrator, such bonds were withheld from Smith, as found by the special findings at p. 18 of the Record, why was not the judgment warranted by such special findings?

Dated June 15, 1901.

GALPIN & BOLTON,
Attorneys for Charles H. Smith.

L. S. B. SAWYER,
Of Counsel.

No. 700

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

C. K. KING, as Administrator of the Estate of J. W. Smith, deceased,
Plaintiff in Error,

vs.

CHARLES H. SMITH and THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a corporation),
Defendants in Error.

Brief of Plaintiff in Error.

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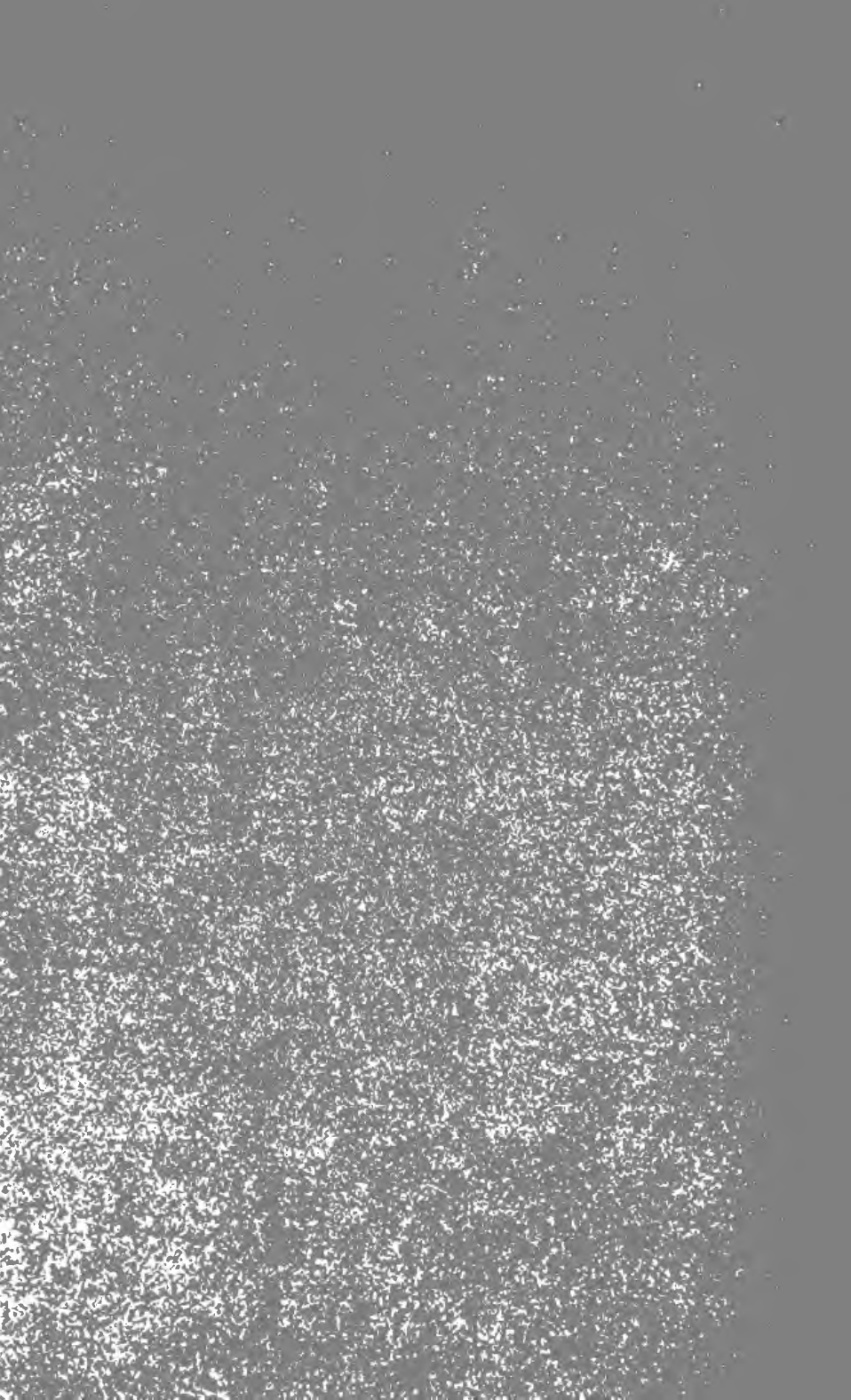

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

C. K. KING, as Administrator of the Estate of J. W. Smith, deceased, Plaintiff in Error, v. CHARLES H. SMITH and THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a corporation), Defendants in Error.	No. 700.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

This is an action at law in the form of replevin brought by the defendant in error, Charles H. Smith, against the plaintiff in error and the California Safe Deposit and Trust Company, to recover one hundred and ninety bonds of the California and Nevada Railroad, valued at $47,500.

The defendant in error, Charles H. Smith, claims

title to the bonds by gift from his father, J. W. Smith. The plaintiff in error denies any such gift and claims the bonds as the administrator of the estate of the said J. W. Smith. The defendant in error, California Safe Deposit and Trust Company, makes no claim of ownership, but, being in possession of the bonds as bailee, holds them as against both the other parties for its own protection.

The facts out of which the controversy arose are as follows:

J. W. Smith died on the 15th day of November, 1895. For many years prior to his death he was the owner of 304 bonds of the California and Nevada Railroad, which included the 190 bonds involved in this action. On March 15, 1893, J. W. Smith entered into an agreement with one J. S. Emery for the sale to the latter of the 304 bonds. This agreement provided for the payment of the price of the bonds in installments, the bonds being deposited during the existence of the contract in escrow with Abner Doble until full payment should be made by Emery. This agreement was not carried out, and another agreement, dated October 24, 1893, was substituted, wherein J. W. Smith agreed to sell the bonds to F. M. Smith upon the terms therein provided. The agreement last mentioned was for an option, to continue for one year, and contained a provision for its extension for an additional year upon the same terms and conditions. This agreement was not carried out during the first year, and it was accordingly extended

for the additional year and finally expired on October 24, 1895 (trans. p. 49). Under this second contract the bonds were continued on deposit with Abner Doble in escrow to be delivered to F. M. Smith upon his compliance with the stipulations therein contained; otherwise Doble was to return the bonds to J. W. Smith or his legal representatives (trans. p. 49). F. M. Smith failed to comply with the terms of the contract, and after October 24, 1895, the bonds were subject to the order of J. W. Smith.

About the 15th day of June, 1895, J. W. Smith was taken sick and never recovered. He gradually grew worse until death relieved him. His ailment seems to have been some form of kidney disease (trans. p. 83). For some time prior to August 14, 1895, he had been exceedingly weak, never leaving his room, and moving about with the aid of a chair, steadying himself with the chair and shoving it along before him (trans. p. 60, 84). At that time he was about eighty years of age. His son, Charles H. Smith, was then living with him at the house of a Mrs. Stewart, in Oakland. Charles had come from Denver the latter part of July and remained with his father until the 2d or 3d of September.

A short time prior to the 14th day of August, 1895, it is claimed by Charles H. Smith that his father delivered to him a memorandum containing a list of all his real estate and directed him to draw up deeds to the various pieces of property; that he did so, and thereafter, on the 14th day of August, 1895, a notary was

called in and several deeds were executed by J. W. Smith (trans. pp. 129–130) by which he transferred his real estate to his children, of whom there were seven, Charles H. Smith receiving an undivided two-thirds interest in a block of land in Oakland; that on the same day, and prior to the call of the notary, J. W. Smith executed to him, said C. H. Smith, an assignment of the 304 bonds in question. This assignment is known as "Plaintiff's Exhibit G" (trans. p. 79). There was no delivery of the bonds, actual or symbolical, at this time.

Charles H. Smith claimed title to the bonds on the trial by virtue of this assignment. The plaintiff in error, however, claimed that it was spurious, that it had been written over an old signature of J. W. Smith, and submitted evidence in support of that claim. The result was that the Court severely criticized the instrument, characterized it as suspicious, and in deciding upon the facts found neither for nor against the assignment, dismissing it from consideration after passing its strictures upon it (trans. p. 31), and decided the case in favor of Charles H. Smith solely upon other evidence in the case, which will be detailed hereafter. Nor did the Court rely to any extent upon the testimony of Charles H. Smith in arriving at its conclusions upon the facts. Therefore, as claimed on the oral argument, this assignment, and the testimony of Charles H. Smith in relation thereto, are entirely removed from consideration in this case as facts. As no finding upon the

validity of this document was made by the trial Court, this Court must regard it upon this appeal as not proved, and disregard it entirely in their consideration of the case.

Some of the suspicious circumstances connected with this alleged assignment are the following:

It was written upon common printing paper (trans. p. 159) and was about five inches in length by about two inches in width.

It is claimed that J. W. Smith, while lying in bed, handed this scrap of paper to his son and directed him to write a bill of sale upon it (trans. p. 128) when there was the usual character of writing paper in the room and on the desk, and no reason is given why paper of that character was not used.

The body of the assignment was written by Charles H. Smith (trans. p. 133), the first two or three lines in a free hand but the remainder cramped, the lines crowded close together, and having an upward tendency as though attempting to "dodge" the signature.

The signature is of heavy black ink (trans. p. 155) showing the oxidation resulting from age, while the ink in the body is blue black (trans. p. 154) and, as testified to by the expert, much more recently written (trans. p. 154).

J. W. Smith was accustomed to write with blue ink and seemed to prefer it (trans. p. 120). The entries in Capt. Thomas' notarial record, written in J. W. Smith's

room when the deeds were executed, are in blue ink. The same ink was used in all the business transactions at that time (trans. p. 82); yet no blue ink appears on the assignment.

The assignment, evidently written on thin printing paper, is pasted on a piece of white paper, and bears the marks of scissors on the edges (trans. p. 158).

The signature, which is doubtless the handwriting of J. W. Smith, is firm and strong, the lines perfect and the shading uniform (trans. p. 159), the concluding line of the "h" is drawn out in a long horizontal line, as is also the cross of the "t". The whole signature bears a most striking resemblance to a signature of J. W. Smith made ten years before the date of the assignment (trans. p. 158); and it is entirely unlike the signatures made near the date of the assignment (trans. p. 158). They are weak and tremulous, almost invariably in blue ink, and all surrounded by a peculiar scroll extending clear around the signature which was adopted by J. W. Smith after his signature had been forged some years before the date of the assignment (trans. p. 93). Upon these general features of the signature the opposing experts were in practical agreement. Even to the unpracticed eye it appears manifest that it was a physical impossibility for J. W. Smith, in his condition at that time, to have written that signature.

The assignment was not acknowledged, although the

notary was in the house that day after the alleged signing (Plff 's. Ex. G.).

Afterwards, when C. H. Smith obtained possession of the bonds, one day before his father's death, and gave a receipt therefor signed "J. W. Smith by C. H. Smith", he did not produce the assignment nor mention it (Dfts. Ex. 5.) and (trans. p. 137).

When sending a receipt for seventy-five of the bonds to the Central Trust Co. of New York to have bonds issued in lieu thereof, he did not produce the assignment (trans. p. 137).

It was not produced in evidence nor shown the plaintiff in error at any of the many hearings in the Superior Court of Alameda County when the question in issue was whether or not the bonds belonged to C. H. Smith or the estate of J. W. Smith (trans. p. 138).

Nor was it produced at the hearing of a foreclosure suit in the Circuit Court where the ownership of the bonds was in issue (trans. p. 140).

Never was it brought forth until a few days before the trial of this case, when it was produced at the taking of the deposition of the witness Palmantier, who, although friendly with C. H. Smith, had never seen nor heard of it before (trans. pp. 79–80).

And by such a document it was claimed that the title to bonds, then valued in the option contract at $212,000, passed to C. H. Smith as a gift!

(See Judge Morrow's comments on this document, trans. pp. 30 to 32.)

So far, therefore, as this assignment is relied upon to prove a gift of the bond, the case must fail, for the execution of the assignment was not established to the satisfaction of the Court.

What, then, is the evidence upon which the Court acted in deciding that a valid oral gift was made of the bonds?

Abner Doble testified in substance as follows: "*I cannot remember distinctly* how I happened to deliver these bonds to Mr. Smith upon this receipt (defendant's Exhibit 5), only *I think*, *my impression is*, that Captain J. W. Smith told me that the bonds belonged to Charlie Smith and to give them to him. I had seen J. W. Smith a *short time* before this occurrence. I was over there to see him a short time before he died. * * * I did not talk much with him about his business at that time. *He was not in a condition to talk much and I did not talk with him much. What he did talk I cannot recall to mind.* * * * *My impression is* that he told me that the bonds belonged to Charlie, and to deliver them to him. *I think* that is why I did so. *I think* that conversation was the ground work of my delivering the bonds to his son." The witness further testified that he did not remember getting any order from J. W. Smith for the delivery of the bonds; that he was seventy-one years old, had been hurt by a railroad car,

and finds that he forgets things often and his memory is not as good as it was before he was hurt (trans. pp. 67 to 70). His testimony throughout is filled with such expressions as "I don't remember", "I am not sure", "my impression is", "I don't call to mind" and other similar expressions. He is sure of nothing, but he delivered the bonds to Charles H. Smith as his father's property, if the receipt is any indication, for it was signed "J. W. Smith by C. H. Smith" (trans. p. 56). On its face the receipt imports that C. H. Smith was acting as his father's agent in the transaction, unless such inference is overcome by Mr. Doble's impressions.

W. G. Palmantier testified, in a deposition taken several days before the trial, that he had been acquainted with J. W. Smith since before 1890, that he commenced to do business with the bank with which witness was connected about 1891 or 1892, and continued to do so up to the time of his death. "At one time I remember he said, 'Well, I don't own anything in the world; I have disposed of everything', and he told me that he had turned over, made deeds of the property to his *daughter*, and also that he had *turned over* the bonds of the California and Nevada Railroad to Charles H. Smith." He had a box in the bank, and witness had a *written order* to deliver the box to C. H. Smith upon the death of J. W. Smith. Witness further testified that he talked with J. W. Smith two or three times about the disposition of his property, the first occurring

within a month of his death; that he did not remember the circumstances of the first conversation because J. W. Smith did not call him there. "He told me *he calculated* that Mr. Smith *would have* the California and Nevada Railroad, Mr. C. H. Smith, and I think it was then that he talked to me about giving his daughter some real estate and property, but not as fully as he did when Mr. King came. I cannot recollect the exact language, but as near as I can recollect *he calculated that Charles H. Smith had the bonds*, OR *they were his*, OR *they belonged to Charlie*, OR *that he had given them to him already*, and I think that he had disposed of them. I wouldn't attempt to state just what he said. I think the next conversation was some couple of weeks before his death, when Mr. King came for me, but it might not have been more than a week. * * * As near as I can state, J. W. Smith said, 'Life is uncertain and we don't know how long we will remain here', or something of that kind, and then he said, 'I have made deeds to my property', and in fact he says in this way 'I don't own anything in the world'. He told me that a couple of times, and that he *had given* the bonds of the railroad to Charles H. Smith, and had disposed of his property by deed to some of his daughters, and had given something to another son, I think. As near as I can recollect is, 'that he had *turned the bonds over;* that he had *given them* to him; that they *were turned over* to Charles H. Smith'. * * * In the presence of C. H. Smith he said, 'I don't own a dollar in the world'.

He told me he had disposed of his property by deed to his daughter, and I think something to his son, and that he had *turned over* his bonds to Charles. He said 'I *have given and turned over* my bonds to C. H. Smith'. I am not attempting to state the exact language." Witness further stated that he saw J. W. Smith the day before he died, and thought he knew him, but would not be sure. He could see that the man was nearing death (trans. pp. 71 to 79).

W. R. Thomas, the notary who took the acknowledgments to the deeds, testified that before August 14, 1895, J. W. Smith had told him that he was going to *deed* all of his property before his death, and on August 14, 1895, had said that "he was *deeding* his property to his children and wanted to acknowledge the deeds and for me to put on the seal. He said nothing further at that time in relation to the deeds" (trans. p. 81). This witness says nothing about the bonds or any assignment or gift of the bonds, although that was the *very day* on which the assignment was supposed to have been executed. His failure to mention it to Thomas is significant.

Charles K. King testified that Charles Smith came out from Denver in June or July, 1895, and that J. W. Smith talked to witness about that time—it may have been either before or after. "He said that he had given away his property to his children, that is, I don't know whether he said all of it; *most* of his property, I think he said, and that his son *would have the--that he*

had given his son the railroad" (trans. p. 117). "From what he said to me and from what his son said also I did not put the bonds in the inventory of the estate" (trans. p. 118). Mr. King also testified, at different times and places, sometimes that J. W. Smith had said that he had given the *railroad* to Charles, and again that he had given the *bonds* to Charles. In his deposition taken a week or so before the trial he said "railroad", and on the trial said "railroad"; then changed to "bonds". He said further that what he had done toward the recovery of the bonds had been pursuant to the demands of the heirs, and by direction of the Court; that he had taken no action on his own account (trans. pp. 123, 124).

On Sept. 11, 1895, a month nearly after he claims the bonds were given him, Charles H. Smith wrote to C. K. King saying, among other things: "Keep me posted about the California-Nevada. *I hope* FATHER *will be able to get out of it*" (trans. p. 111).

On Nov. 24, 1897, two years after J. W. Smith's death, Charles H. Smith wrote to W. R. Davis a long letter containing the language set out in the opinion of the Circuit Judge (trans. p. 33), and also the following: "As a matter of fact all the personalty owned by my father at his death belongs to me, and I have a paper showing that to be the case, and which can be pretty nearly construed as a will" (trans. p. 147). (And also see this paper, Defendant's Exhibit 25, p. 150.)

The evidence shows no delivery of the bonds until November 14, 1895 (trans. p. 56), the day before J. W. Smith's death. On that day J. W. Smith was in a condition of unconsciousness or stupor, and consciousness never returned (trans. pp. 59–61–63). After Charles H. Smith returned to Denver about September 2nd, he was not in Oakland again until about four days before his father's death (trans. p. 60). Mr. King testifies that when C. H. Smith arrived he thought he recognized his son and said "Charlie" or something like that. When King said to him "Here is Charlie come to see you" he never answered (trans. p. 58). "I never saw Mr. Smith engage in talking with anybody or answer questions of anybody after Charles H. Smith came there except the time he said Charlie" (trans. p. 59).

Mrs. Stewart, who lived in the same house as J. W. Smith, and who had known him for seven years, testified that she saw him every day for some time prior to his death, and that he did not talk to anybody for four or five days before his death, and for two days before his death was unconscious and in a stupor (trans. pp. 60–63).

Capt. Thomas testified that he saw J. W. Smith the day before he died, and said, "I did not attempt to have any conversation with him at that time. He was then in his bed lying down flat. His eyes were closed" (trans. p. 84).

Charles H. Smith testified that from the time of his

arrival in Oakland up to the time of his father's death he was with him most of the time, yet he did not testify as to his condition, mental or physical, during that time. *Neither did he testify to any oral gift or any words of gift whatever, aside from the written assignment.*

The correspondence between father and son shows that their relations were pleasant. C. H. Smith acted for his father in the drawing of the deeds, and discussed the disposition of his property with him. They had a common bank account at the Central Bank against which either could check. The letter of C. H. Smith to W. R. Davis (trans. pp. 141 to 150) shows entire familiarity with his father's affairs. This testimony shows a confidential relation between C. H. and J. W. Smith, as was held by the trial Court (trans. p. 34).

The letter above referred to (Defendant's Ex. 24) shows that J. W. Smith was rather heavily in debt at the time of his death.

The foregoing is, we believe, the substance of all the testimony upon which this Court is asked to decide that J. W. Smith, while old, weak, infirm and in his last illness, and while in debt, orally gave to his son, Charles H. Smith, toward whom he stood in a relation of trust and confidence, and who had already been provided for in the deeds, and who stands before this Court in the attitude of presenting to it as genuine a document so suspicious as to be cast aside by the trial

Court, bonds then valued at over $200,000, to the exclusion of his other children and his creditors.

Assignment of Errors.

On this writ of error the plaintiff relies upon the following assignments of error, to-wit:

(2) That the Court erred in finding so much of the finding of fact numbered 2 as reads as follows:

"The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to the possession of the property described in the complaint."

(3) That the Court erred in finding that at the time of the commencement of the action, or on the 26th day of September, 1900, the plaintiff was the owner of the property described in the complaint.

(4) That the Court erred in finding that on the 26th day of September, 1900, or at the time of the commencement of the action, the plaintiff was entitled to the possession of the property described in the complaint.

(6) That the Court erred in finding so much of finding of fact numbered 2 as reads as follows:

"The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of plaintiff."

(8) The Court erred in making finding of fact num-

bered 4, which reads as follows:

"That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff."

(9) The Court erred in so much of finding numbered 4 as states that the defendant King, as administrator of the estate of J. W. Smith, deceased, has not, or ever had, any interest in the property described in the complaint, and that said defendant King, as such administrator, was not entitled to the possession of said personal property or any part thereof.

(10) The Court erred in so much of finding numbered 4 as states that the estate of J. W. Smith, deceased, has not, and never had any interest in the property described in the complaint, and is not entitled to the possession of said personal property or any part thereof.

(11) The Court erred in its finding that said corporation is not entitled to longer hold possession of said personal property from the plaintiff.

(12) The Court erred in its conclusion of law which reads as follows:

"That the plaintiff is entitled to recover of and from

the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possession thereof."

(13) That the Court erred in making,rendering and giving the judgment given, made, and entered in this case, for the reason that the same is against law, and contrary to the evidence.

(14) That the Court erred in giving and rendering judgment in favor of the plaintiff (defendant in error) and against the defendant King (plaintiff in error).

(15) That the Court erred in finding that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint, the owner, or entitled to the possession of the property described in the complaint or any part thereof.

Argument.

All of the foregoing assignments, while set out in different ways, raise but the single proposition of law involved in this case, viz.:

Is the evidence sufficient, under the law relating to gifts, and in view of the existing confidential relation, to establish a valid and legal gift of the bonds involved in this action?

This proposition, however, for convenience of discussion may be subdivided and affirmatively stated as follows:

1. *Aside from the confidential relation, the evidence*

is insufficient to establish an oral gift.

2. *The existence of a confidential relation, and the suspicious facts appearing in the record, raise a presumption of the illegality of the gift, which the evidence is not sufficiently clear and strong to overcome.*

I.

Viewed in its most favorable light to sustain the judgment, we think the evidence falls far short of establishing a legal gift, even without considering the relation of trust and confidence existing between the parties.

It was evidently the intention on the trial to make the assignment (Plaintiff's Exhibit G), the *basis* of the claim of gift, and use the declarations of J. W. Smith in *corroboration* of the execution of the assignment. But as this basis is swept out of consideration by the refusal of Judge Morrow to find its execution as a fact, defendant in error is driven to rely upon these declarations as evidence of an *oral* gift, as to which there is *no direct testimony*, even by C. H. Smith himself, neither as to the time, words of gift, nor any other essential fact.

As there is no direct evidence in the record of any gift aside from the discredited assignment, let us consider whether these declarations and other circumstances are sufficient to establish a formal gift.

The testimony of Thomas, King, Palmantier and Doble was taken between five and six years after J. W. Smith's death, and doubtless neither of these gentlemen then had cause to believe that they would be called upon to state those conversations after the lapse of that time. They do not attempt to state the exact language. In the nature of things they could not. Mr. Palmantier states that J. W. Smith said that "he calculated" that his son "would have" the bonds, *or* the railroad; again, that "he calculated" that his son "had" the bonds, "*or* that they were his, *or* they belonged to Charlie, *or* that he had given them to him already". Again, that he had "turned the bonds over", that "he had given them to him". Again, "I have *given and turned over* my bonds to C. H. Smith" (trans. pp. 77–78). These statements are not only insufficient but irreconcilable, and serve only to show how treacherous is the human memory. None of these expressions, even the use of the word "given", imports a formal gift, as was held by Justice Harrison in

White v. *Warren*, 120 Cal. 327.

In *Giselman* v. *Starr*, 106 Cal. 651, it appeared that a father had made declarations that he had given a note and mortgage to his incompetent daughter. He was her guardian and went so far as to incorporate the note and mortgage in the inventory as her property. No declaration could be more formal, yet the Court held that no valid gift was shown.

In *Estate of Rathgeb*, 125 Cal. 302, the deceased had

given an order for the delivery of personal property. There was also other testimony as to a gift, but *no word or act of gift.* *Held*, that the evidence was insufficient to establish a gift.

If the testimony of Palmantier is not sufficient under the above authorities to establish a valid gift, how much less effective must be the weaker testimony of the other witnesses. King, who is making a contest for the bonds only by express direction of the Superior Court of Alameda County, and with whom C. H. Smith seems to be on quite friendly terms (see Deft's. Ex. 24), testifies that J. W. Smith told him that "his son *would have* the—that he had given his son the railroad" (trans. p. 117). Here is a direct contradiction in the same sentence. The words "would have" cannot by any construction be reconciled with a present or past gift of the bonds. They refer solely to the future. The rest of King's testimony is not definite and certain, for while in his deposition taken a few days before the trial he said the statement was that J. W. Smith had given his son the "railroad", on the trial he changed the word to "bonds" (trans. p. 123).

Capt. Thomas, the notary, does not mention the bonds at all. Smith did not declare to him that he had given the bonds to Charles, although he was supposed to have executed the alleged assignment but a few hours before. Smith's statement to him was that he had *deeded* away his property, referring, of course, to the deeds executed that day. Neither this statement,

nor the statement to Palmantier that he "did not own anything in the world" can be taken to mean that all his property had been transferred, for the record shows that he left estate which was actually administered upon and sold under order of the Probate Court for $4,482.50, and appraised for $9,090.10. This condition is incompatible with that declaration.

The testimony of Doble is so filled with such expressions as "my impression is", "I think", "I can't call to mind", etc., as to be utterly useless in connection with his admitted failure of memory, to furnish that character of evidence which the law calls "satisfactory". It must be placed in the category of "slight" evidence, if worthy of notice at all.

"That evidence is deemed *satisfactory* which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated *slight* evidence."

Code Civil Procedure, Sec. 1835.

This weak and unsatisfactory evidence is rebutted by the very nature of the transaction between C. H. Smith and Doble; for if Doble actually believed that the bonds *belonged* to Chas. H. Smith what object could be subserved by taking a receipt signed "J. W. Smith, by C. H. Smith"? This receipt raises a presumption of agency which Doble's testimony is not strong enough to overcome.

In connection with C. H. Smith's total failure to testify to any other word or act of gift than the discredited

assignment, and the adverse presumption of law which that failure raises (*C. C. P.*, Sec. 2061, subd. 7), let us notice the declarations of C. H. Smith himself with reference to these bonds. In Defendants' Exhibit 23 (trans. p. 141), a letter written to King by C. H. Smith less than a month after the supposed gift, Smith says: "Keep me posted about the California-Nevada. *I hope father will be able to get out of it.*" If there had been any valid gift his father was already "out of it".

Again, in Defendants' Exhibit 24 (p. 147) Smith says: "As a matter of fact, all the personalty owned by my father at the time of his death belongs to me, and I have a paper showing that to be the case, and which can pretty nearly be construed as a will." The paper referred to is Defendants' Exhibit 25 (p. 150), in which J. W. Smith mentions the tin box in the Central Bank. Chas. H. Smith on another occasion, at a date not far distant from that of Defts'. Ex. 24, swore that the bonds in question were *in the tin box* (p. 151–2). So it is clear that at that time C. H. Smith's claim was by a *gift of the tin box*, which he falsely swore contained the bonds. When that theory was exploded, the assignment, after a long rest, comes to light; and when the assignment fails, the gift is attempted to be shown by declarations of the deceased *alone*, testified to after the lapse of six years, and unsupported by any testimony of any word or act of gift. Do such shifting and evasion appeal to the judgment of any court? Is such evidence sufficient to produce "moral certainty or con-

viction" in the minds of this Court?

The law raises no presumptions in favor of gifts, and where a claim of gift is asserted after the donor's death, it must be proved by clear and satisfactory evidence.

Denigan v. *Hibernia Bank*, 127 Cal. 137.
Denigan v. *S. F. Savings Union*, 127 Cal. 142;

But it takes other evidence to establish a gift than mere words. *There must be a delivery or its equivalent.*

In *Daniel* v. *Smith*, 64 Cal. 346, and *Daniel* v. *Smith*, 75 Cal. 548, in which 107 U. S. 602, was quoted approvingly, it was held that there must be a delivery of the thing in order to constitute a valid gift, and that the delivery must be such as to authorize the donee to *reduce the fund into possession.*

See also

Dow v. *Gould & C. S. M. Co.*, 31 Cal. 629.

In *Zeller* v. *Jordan*, 105 Cal. 143, where the opinion is written by Justice DeHaven, it is held that a gift *inter vivos must take effect at once*, and that there must be a delivery.

Does this oral gift, which is uncertain as to date, but which must have been made, if at all, before C. H. Smith left for Denver on the 2d or 3d of September, come within the rule of this decision, when there was *no delivery* until after J. W. Smith had sunk into a stupor from which he never rallied, and therefore none *to which he was a party?*

It is held in many cases that death before completion

of a gift by delivery will operate as a revocation.

14 Am. & Eng. Enc. of Law, 2d ed. p. 1016;
Permanent Fund v. *Hall*, 48 Ill. App. 536,
23d St. Baptist Church v. *Cornell*, 117 N. Y. 601.

Was not this last unconsciousness the equivalent of death?

So long as anything remains to be done to complete a gift it may be revoked by the donor.

14 Am. & Eng. Enc. of Law, 2d ed. p. 1016.

In *Ruiz* v. *Dow*, 113 Cal. 490, it is held that in order to effectuate a gift the donor must *divest himself absolutely* of any right to the thing given.

When J. W. Smith last closed his eyes upon this world, the alleged gift was not complete; there had been no delivery; it was revocable; his right to the bonds had not been absolutely divested; he had at that moment the right to their possession. Can it be possible, therefore, that a delivery afterwards but before death succeeded the stupor, is of any legal effect or value to complete the gift or give it vitality?

In *Hart* v. *Ketchum*, 121 Cal. 426, it is held that a mere purpose to give is not sufficient. *Delivery* by the donor with intent *at that time to vest title* is what makes the gift effectual.

What "intent" could have been in the mind of J. W. Smith at the time of the delivery of the bonds?

In *Knight* v. *Tripp*, 121 Cal. 674, it was held that the delivery of a key was not a sufficient delivery of a box

and contents. It was further held that the same requisites are necessary for a gift *inter vivos* as for gift *causa mortis*, and that the execution of a *written instrument* does not help a gift in the absence of delivery. This is a very interesting case.

A mere intention to give is a nullity.

14 Am. & Eng. Enc. of Law, 2d ed. 1017.

"Delivery must be actual, if possible. If not, some act equivalent thereto that has *the legal effect to pass the title* must be done in connection with or about the property."

Id., p. 1020.

"In some cases the delivery necessary to transfer the ownership of property by gift may be made by delivering to the donee the means of obtaining possession of the property, whereby he is put into constructive possession thereof. This occurs in the case of a gift of property contained in a trunk or chest, vault, room or building, where the donor, *with words of gift*, *delivers the key affording access to the property to the donee*, with the intention of placing him in possession."

Id., p. 1021;

Civil Code, Sec. 1147.

We ask, in all candor, is there any evidence in this case of actual or symbolical delivery of the bonds within the above rule? If so, where is it to be found? If not, the gift fails and the judgment must be reversed.

II.

But if, under any possible construction, the evidence can be held to be sufficient to show all of the elements

necessary to make a valid gift, can it be said to be sufficient where a confidential relation exists, and where suspicious circumstances appear in the transaction?

J. W. Smith was eighty years of age; in his last illness; feeble physically; incapable of caring for himself. His son was the exact reverse of this condition; assisted his father in his business matters; drew his deeds; advised with him concerning his property; corresponded with him; they had a common bank account. From this close relation C. H. Smith emerges with a deed to two-thirds of a block of land in Oakland, $212,000 in bonds, and a written assignment to evidence his title thereto which the trial Court casts aside as suspicious.

In this state of facts is it not the rule of law that such a gift is presumptively illegal, and the burden is upon the donee to overcome it by clear and positive testimony?

"The rule of law favoring gifts from parent to child will not hold where the circumstances are such as to raise the presumption that the gift was obtained by undue influence. Where the parent is enfeebled in mind and body, from age or other cause, and in a situation rendering probable the exercise of undue influence on the part of the child, the burden of proof rests upon the child claiming the gift to show that a gift was intended, *and that it was the voluntary, intelligent act of the donor.*"

14 Am. & Eng. Enc. of Law, 2d ed. p. 1036;
Stewart's Estate, 137 Pa. St. 175;
Collins v. *Collins*, 15 Atl. Rep. 849.

The alleged assignment, Plaintiff's "Exhibit G", is

not only a suspicious document in this connection, but strong evidence of undue influence, and of an intent to back up a fraudulent transaction. It recites that it was made "for value received" and on its face imports a sale, not a gift, while on the trial there was no pretence of a consideration. Under these circumstances this recital is evidence of undue influence.

Taylor v. *Taylor*, 8 How. 183;
Towson v. *Moore*, 173 U. S. 25.

See *Shirley* v. *Shirley*, 92 Cal. 44, to the effect that the evidence of a gift under such circumstances as are disclosed by this record, must be clear and strong.

And also *White* v. *Warren*, 120 Cal. 327, and *Denigan* v. *Hibernia Bank*, 127 Cal. 137, to the effect that there are no presumptions in favor of gifts.

Under the above decisions, the uncertain testimony that J. W. Smith had said that he had "given and turned over" the bonds to his son, does not come up to the requirements of the law. Such expressions are entirely consistent with a "turning over" of the bonds to C. H. Smith to hold as the property of and for the benefit of J. W. Smith. As was held by Justice Harrison in *White* v. *Warren*, 120 Cal. 327, such expressions are not the equivalent of words of gift. Justice Harrison says:

"Her statement that she had 'given' him the money was not equivalent to a declaration that she had made him a 'gift' of it, *since the term is often used as the equivalent of a mere delivery.*"

"Where a gift *inter vivos* is not asserted until after the death of the alleged donor, the evidence to sustain it must be as clear, strong and convincing as the evidence required to sustain a gift *causa mortis*. The rule in both cases rests upon the principle that *gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts.*"

Matter of Manhardt, 44 N. Y. Supp. 836.

"In order that the rights of creditors may not be prejudiced, that the donor may not be circumvented by fraud, that he may be protected from undue influence which would result in an unequal and unjust distribution of his estate, and that efficacy may not be given to gifts made under legal incapacity, as well as on other grounds, it is held that gifts *inter vivos* are *watched with caution* by the courts, and that to sustain them *clear and convincing evidence is required.*"

14 Am. & Eng. Ency. of Law, 2nd ed., p. 1049.

An admission by the donor, although evidence to be weighed by the jury as tending to establish a gift, *is not in itself sufficient proof of the gift.*

Rooney v. *Minor*, 56 Vt. 527.

For the reasons above set out we ask that the judgment of the Circuit Court be reversed.

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